

Penn State Journal of Law & International Affairs

Volume 8 | Issue 2

September 2020

The Role of International Human Rights Law in the Adjudication of Economic, Social, and Cultural Rights in Africa

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ISSN: 2168-7951

Recommended Citation

John Mukum Mbaku, *The Role of International Human Rights Law in the Adjudication of Economic, Social, and Cultural Rights in Africa*, 8 PENN. ST. J.L. & INT'L AFF. 579 (2020).

Available at: <https://elibrary.law.psu.edu/jlia/vol8/iss2/8>

The Penn State Journal of Law & International Affairs is a joint publication of Penn State's School of Law and School of International Affairs.

Penn State Journal of Law & International Affairs

2020

VOLUME 8 NO. 2

THE ROLE OF INTERNATIONAL HUMAN RIGHTS LAW IN THE ADJUDICATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICA

*John Mukum Mbaku**

ABSTRACT

Since the adoption of the Universal Declaration of Human Rights in 1948, there has been significant progress in the recognition and protection of human rights around the world. The international community has, since 1948, adopted several treaties, which impose obligations on States Parties to make certain that the human and fundamental rights of their citizens are recognized and fully protected. Although human rights are considered the domain of international law, international legal scholars have argued that national governments—that is, the governments of States Parties—must function as the mechanisms for enforcing international human rights law. However, in order for national governments to enforce international human rights law, each country that ratifies an international human rights treaty must incorporate the treaty into its national constitution and hence, create rights that are justiciable in domestic courts. Thus, an African country can, through its constitution, cast away any doubts regarding whether international law, including customary international law, is law within its jurisdiction. This article notes that in African countries whose constitutions do not expressly define a law of reception for international law, it is still possible for domestic courts to employ international law and comparative case law in the interpretation and adjudication of cases involving human rights. After examining cases from several African countries to determine the extent to which domestic courts have utilized international law and comparative law sources in their decisions generally and interpretation of national constitutions in particular, the article then examines two cases from the Constitutional Court of South Africa involving socio-economic rights. It is determined that, even where African States have not yet domesticated international human rights instruments and created rights that are justiciable in domestic courts, progressive judiciaries can still enhance the recognition and protection of human rights by using international law as an interpretive tool in their legal adjudications. Nevertheless, the ultimate goal must remain the domestication of international human rights instruments to create rights that are justiciable in domestic courts.

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I. INTRODUCTION

Legal scholars, policymakers, as well as, human rights activists, consider the founding of the United Nations in 1945, and the subsequent adoption of the Universal Declaration of Human Rights (“UDHR”) on December 10, 1948, by the UN General Assembly¹ as “the beginning of the modern struggle to [recognize and] protect human rights.”² Nevertheless, it has been argued that the origins of human rights can be traced back “to early philosophical and religious ideas as well as legal theories of the ‘natural law’—a law higher than the ‘positive law’ of states (such as legislation).”³ These theories posit that “positive laws must either be derived from or reflect ‘natural law’ because individuals have certain immutable rights as human beings.”⁴

Since the adoption of the UDHR in 1948, the global community “has codified a series of fundamental precepts that are intended to prevent such grave abuses as arbitrary killing, torture, discrimination, starvation, and forced eviction.”⁵ In addition, “[s]tandards have also been developed for positive rights such that governments can provide the means of assuring, for example, fair trials, education, and health care.”⁶ During this period, international

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¹ The *Universal Declaration of Human Rights* was adopted by UN General Assembly Resolution 217 (III), on December 10, 1948, at the Palais de Chaillot, Paris. See *Universal Declaration of Human Rights*, UN GA Res. 217 (III), December 10, 1948, <https://www.un.org/en/universal-declaration-human-rights/> (October 3, 2019).

² DAVID WEISSBRODT AND CONNIE DE LA VEGA, *INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION* 3 (2007).

³ WEISSBRODT, *supra* note 2, at 3.

⁴ WEISSBRODT, *supra* note 2, at 3.

⁵ WEISSBRODT, *supra* note 2, at 3.

⁶ WEISSBRODT, *supra* note 2, at 3.

and regional organizations, as well as governments, have developed and adopted various “procedures for protecting against and providing remedies for human rights abuses.”⁷

Human rights are generally considered the domain of international law.⁸ Given that treaties and custom are the most important sources of international law, any study of international human rights law must necessarily involve taking a look at treaties.⁹ One of the most important treaties of the modern era is the United Nations Charter, which is a “multilateral treaty among all the UN member nations” and which “established the United Nations.”¹⁰ With respect to international human rights, the most important treaties are the International Covenant on Civil and Political Rights (“ICCPR”)¹¹ and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),¹² both of which were drafted by the United Nations. The two covenants, together with the UDHR, are generally referred to as the International Bill of Human Rights.¹³

The International Covenant on Civil and Political Rights, which was adopted on December 16, 1966, and opened for signature on December 19, 1966, at New York, entered into force on March 23, 1976, in accordance with the treaty’s article 49.¹⁴ As of this writing, the

⁷ WEISSBBRODT, *supra* note 2, at 3.

⁸ WEISSBBRODT, *supra* note 2, at 4.

⁹ Treaties are defined as “agreements between nations that are intended to have binding legal effect between the governments that have formally agreed to them.” WEISSBBRODT, *supra* note 2, at 4.

¹⁰ WEISSBBRODT, *supra* note 2, at 4.

¹¹ *International Covenant on Civil and Political Rights* (ICCPR), 999 U.N.T.S. 171 (December 16, 1966).

¹² *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 993 U.N.T.S. 3 (December 16, 1966).

¹³ WEISSBBRODT, *supra* note 2, at 4. *See also* CHRISTOPHER N. J. ROBERTS, THE CONTENTIOUS HISTORY OF THE INTERNATIONAL BILL OF HUMAN RIGHTS 2–3 (2015) (noting, *inter alia*, that the ICESCR, the UDHR and the ICCPR are collectively known as the International Bill of Human Rights).

¹⁴ Article 49(1) of the International Covenant on Civil and Political Rights states that “[t]he present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.” *See* ICCPR, *supra* note 11, art. 49(1).

ICCPR has been ratified by 173 States.¹⁵ The International Covenant on Economic, Social and Cultural Rights, which was also adopted on December 16, 1966, and opened for signature on December 19, 1966, entered into force on January 3, 1976, in accordance with article 27 of the treaty.¹⁶ As of this writing, the ICESCR has been ratified by 170 States.¹⁷

Given the fact that the global community does not have a “world government” that can make certain that human rights are recognized and protected, the question is: Who enforces international human rights law? While noting that human rights law is part of international law, legal scholars have argued that “[t]he most effective mechanism for enforcing international law [including international human rights law] is for each ratifying government to incorporate its treaties and customary obligations into national laws.”¹⁸ Some African countries have already modified their national constitutions to expressly define how international law should be treated by their domestic courts. For example, the Constitution of the Republic of Kenya, 2010, states that “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”¹⁹ In addition, the Kenyan Constitution also states that “[t]he general rules of international law shall form part of the law of Kenya.”²⁰ The Constitution of the Republic of Bénin states that “[t]reaties or agreements lawfully ratified shall have, upon publication, an authority

¹⁵ See United Nations Treaty Collection, *International Covenant on Civil and Political Rights: Status of Treaties*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (October 3, 2019).

¹⁶ Article 27(1) of the International Covenant on Economic, Social and Cultural Rights states that “[t]he present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.” See ICESCR, *supra* note 12, at art. 27(1).

¹⁷ See United Nations Treaty Collection, *International Covenant on Economic, Social and Cultural Rights: Status of Treaties*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en (October 3, 2019).

¹⁸ WEISSBRODT, *supra* note 2, at 4.

¹⁹ CONSTITUTION OF THE REPUBLIC OF KENYA, 2010, art. 2(6).

²⁰ CONSTITUTION OF THE REPUBLIC OF KENYA, 2010, art. 2(5).

superior to that of laws, without prejudice for each agreement or treaty in its application by the other party.”²¹

Whether an international treaty that has been signed and ratified by a country can automatically become a part of that country’s national laws will depend on “how effect is given to international instruments in the particular country.”²² Within the international law literature, there exist two well-established approaches to the determination of how effect is given to international law instruments or how domestic courts receive international and foreign law. These are the “monist” approach,²³ and the “dualist” approach.²⁴ In those countries in which the relationship between international law and domestic law is regulated by monism, “the latter and the former comprise one single legal order within the nation’s legal system.”²⁵

In countries that follow the monist approach, however, within the domestic legal system, international law is superior to domestic law. Hence, “in an African country which adheres to this approach, the provisions of international human rights instruments, for example, override any contrary domestic law.”²⁶ This assumes, of course, that

²¹ CONSTITUTION OF THE REPUBLIC OF BENIN, 1990, art. 147. Note that “Benin” (Republic of Benin) is the English spelling of the country’s name and “Bénin” (*République du Bénin*) is the French spelling. Since the country prefers the French spelling, this article will use “Bénin” or Republic of Bénin throughout.

²² Charles Manga Fombad, *Internationalization of Constitutional Law and Constitutionalism in Africa*, 60 AM. J. COMP. L. 439, 447 (2012).

²³ The monist approach to international law is prevalent in countries that follow “the civil law tradition derived from Roman law and include such nations as: Austria, Belgium, Luxembourg, France, and Germany,” as well as Francophone and Lusophone countries in Africa. See WEISSBRODT, *supra* note 2, at 4. See also Fombad, *supra* note 22, at 447. See also Graham Hudson, *Neither Here nor There: The (Non-) Impact of International Law on Judicial Reasoning in Canada and South Africa*, 21 CANADIAN J. L. & JURISPRUDENCE 321 (2008) (examining, inter alia, the monist and dualist approaches to judicial reception of international and foreign law).

²⁴ The dualist approach is prevalent in the countries that follow the Common Law tradition of England and Wales and which spread later to former British colonies (e.g., Australia, Canada, India, New Zealand, and several Anglophone African countries). See, e.g., Fombad, *supra* note 22, at 447.

²⁵ John Mukum Mbaku, *International Law and Limits on the Sovereignty of African States*, 30 FLA. J. INT’L L. 43, 69 (2018).

²⁶ Mbaku, *supra* note 25, at 69.

the African country with the monist system has signed and ratified the international human rights instrument in question.

Specifically, in those countries that follow the monist approach to international law, once an international treaty has been signed and ratified by the country, it is not necessary for national authorities to domesticate the treaty and create rights that are justiciable in national courts. For, the act of ratification alone automatically incorporates that international instrument into national law and hence, creates rights that are justiciable in municipal courts.²⁷ Domestic courts in monist States, then, must “give effect to principles of international law over [superseding] or conflicting rules of domestic law.”²⁸

In those countries that follow the dualist approach to international law, the national legal system may consider “international law as binding between governments” but, “it may not be asserted by individual residents of the country in national courts unless the legislature or other branch of government makes it national law or regulation.”²⁹ In these countries, international law and national law are considered separate and independent of each other. International law, it is argued, “prevails in regulating the relations between sovereign States in the international system, whereas municipal law takes precedence in governing national legal systems.”³⁰ For international law to create rights that are justiciable in national courts, the national legislature or some other authority must incorporate, through explicit legislation, the provisions of the international instruments into domestic law.³¹

²⁷ See COALITION TO STOP THE USE OF CHILD SOLDIERS & UNICEF, GUIDE TO THE OPTIONAL PROTOCOL ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT 24 (noting, inter alia, that “[i]n States with a ‘monist system’, the treaty is automatically incorporated into national law upon ratification”).

²⁸ Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT’L L. 103, 109 (2002).

²⁹ WEISSBRODT, *supra* note 2, at 5.

³⁰ Adjami, *supra* note 28, at 109.

³¹ See COALITION TO STOP THE USE OF CHILD SOLDIERS & UNICEF, *supra* note 27, at 24 (noting, inter alia, that “States with a ‘dualist’ system must incorporate the treaty into domestic law through explicit legislation to make the treaty locally enforceable”).

When making reference to “international law’s binding status in domestic legal systems,” international legal experts and international jurists have distinguished between “the types and sources of international law.”³² In general, international jurists consider international norms “that have attained the status of international customary law . . . to be part of municipal law under both the monist and dualist theories, and therefore prevail over national law even in domestic courts.”³³ Some countries, such as the United Kingdom (“UK”), however, are not completely dualist in their approach to international law—as part of the European Union, the UK has “accepted all of European Union law as part of its national law which may be directly applied by the courts and administration.”³⁴

Unless a dualist State has internationalized its national constitution and created rights that are justiciable in municipal courts, violations of international law, including international human rights law, can only “be asserted at the international level.”³⁵ It is important, then, especially for the recognition and protection of human rights,

³² Adjami, *supra* note 28, at 109.

³³ Adjami, *supra* note 28, at 109.

³⁴ WEISSBRODT, *supra* note 2, at 5. Of course, following a June 23, 2016 referendum, 51.9% of British voters opted to leave the European Union. Her Majesty’s Government formally announced the country’s withdrawal from the EU in March 2017. That announcement started a two-year process that was supposed to cumulate in the UK withdrawing from the EU on March 29, 2019. The dateline was eventually extended to October 31, 2019. As of this writing, what is referred to as “Brexit,” a portmanteau of the words “British” and “exit,” has taken place—the UK officially left the EU on January 31, 2020 and effectively entered an eleven-month transition period. During this transition period, the UK will remain a member of the EU’s customs union and single market and will continue to obey all EU rules. Nevertheless, the UK will no longer have membership in all of the EU’s political institutions, including, for example, the EU Parliament. Negotiations between the UK and the EU are currently underway to agree on a treaty that will determine the nature of the trade relationship between the EU and the UK. By the end of January 2021, the UK’s exit from the EU will effectively be completed, either with or without a trade deal. After that date, it is expected that EU law will no longer be applied directly by the courts and administration of the UK. *See, e.g.*, Peter Barnes, *Brexit: What Happens Now?*, BBC NEWS, Feb. 5, 2020, <https://www.bbc.com/news/uk-politics-46393399> (last visited on Mar. 6, 2020). *See also* TIM OLIVER, EUROPE’S BREXIT: EU PERSPECTIVES ON BRITAIN’S VOTE TO LEAVE (2018) (examining, *inter alia*, the debate on the UK’s decision to leave the EU).

³⁵ WEISSBRODT, *supra* note 2, at 5.

that policymakers in each African country, particularly those which follow the dualist approach, enact explicit legislation to domesticate the various international human rights instruments and create rights that are directly justiciable in domestic courts.

It is also important to note that the “effect of international law on a national system also hinges on the properties of international instruments themselves.”³⁶ For example, the Universal Declaration of Human Rights is generally considered “a hortatory declaration of principles and aspirations” and hence, it “does not have the legal status of a treaty.”³⁷ However, since the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), and the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) are international treaties, they are binding on all States Parties.³⁸

With respect to the recognition and protection of human rights in Africa, a few treaties are critical. First, is the African (Banjul) Charter on Human and Peoples’ Rights (“ACHPR” or “Banjul Charter”): the ACHPR is binding on all States Parties. According to article 1 of the ACHPR, the “parties to the present Charter [i.e., the ACHPR] shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measure to give effect to them.”³⁹ According to the African Commission on Human and Peoples’ Rights, as of this writing (2020), fifty-four African Union

³⁶ Adjami, *supra* note 28, at 110.

³⁷ Adjami, *supra* note 28, at 110.

³⁸ An international treaty’s binding effect can be traced to or stems from the principle in international law referred to as *pacta sunt servanda*. This principle is codified in article 26 of the *Vienna Convention on the Law of Treaties*. Article 26, which is titled “Pacta sunt servanda,” states as follows: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” See *Vienna Convention on the Law of Treaties (with annex)*, concluded at Vienna on May 23, 1969, art. 26, 1155 U.N.T.S. 331 (1969).

³⁹ *African (Banjul) Charter on Human and Peoples’ Rights*, adopted on June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on Oct. 21, 1986, art. 1.

Member States had ratified the ACHPR. The latest country to ratify the treaty was South Sudan, which did so on October 23, 2013.⁴⁰

The failure of a State Party to the ACHPR to adopt necessary measures to give effect to the provisions of the ACHPR, that is, to domesticate the ACHPR and create rights that are justiciable in the State Party's domestic courts, is a breach of the Charter. Article 62 of the Charter imposes an obligation on States Parties to "undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter."⁴¹ Many scholars of human rights in Africa have noted that "[t]he combined effect of articles 1 and 62 suggests that in light of resistance to the signing and ratification of the International Covenants, the drafters of the African Charter paid particular attention to ensuring the binding force of the Charter in national legal systems."⁴²

The African Commission on Human and Peoples' Rights ("African Commission") is the "primary human rights body on the African continent."⁴³ The African Commission's "progressive interpretation of the Charter" has allowed it to give "guidance to states about the content of their obligations under the Charter," and the

⁴⁰ African Commission on Human and Peoples' Rights, Ratification Table: African Charter on Human and Peoples' Rights, <https://www.achpr.org/ratificationtable?id=49> (Oct. 4, 2019). The list of States that have ratified the ACHPR does not include Morocco, which withdrew from the Organization of African Unity (OAU) in 1984 over the OAU's recognition of the independence of the Moroccan-occupied Western Sahara. Morocco returned to the African Union (the successor organization to the OAU) in 2017. *See, e.g.*, Hamza Mohamed, *Morocco rejoins the African Union after 33 years*, AL JAZEERA NEWS, Jan. 31, 2017, <https://www.aljazeera.com/news/2017/01/morocco-rejoins-african-union-33-years-170131084926023.html> (Oct. 4, 2019).

⁴¹ Banjul Charter, *supra* note 39, art. 62.

⁴² Adjami, *supra* note 28, at 111.

⁴³ CENTER FOR HUMAN RIGHTS, FACULTY OF LAW, UNIVERSITY OF PRETORIA & THE AFRICAN COMMISSION, A GUIDE TO THE AFRICAN HUMAN RIGHTS SYSTEM: CELEBRATING 30 YEARS SINCE THE ENTRY INTO FORCE OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS, 1986–2016, 8 (Pretoria University Law Press, 2016).

Charter's "provisions have inspired domestic legislation."⁴⁴ In some African countries, "the Charter is an integral part of national law by virtue of the constitutional system in place."⁴⁵ For example, in their constitution, the people of the Republic of Bénin, make clear that the provisions of the African Charter on Human and Peoples' Rights, which Bénin ratified on January 20, 1986, are an integral part of both the constitution and Béninese law. Specifically, the Constitution of the Republic of Bénin states as follows:

WE, THE BÉNINESE PEOPLE, [r]eaffirm our attachment to the principles of democracy and human rights as they have been defined by the Charter of the United Nations of 1945 and the Universal Declaration of Human Rights of 1948, by the *African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 and whose provisions make up an integral part of this present Constitution and of Béninese law and have a value superior to the internal law*.⁴⁶

Since Bénin's constitution makes the provisions of the African Charter "an integral part of" the country's constitutional law, as well as "of Béninese law," it has effectively created rights that are justiciable in the country's domestic courts. Nigeria, a dualist country, however, enacted explicit legislation to "make the Charter part of domestic law."⁴⁷

Second, is the African Charter on the Rights and Welfare of the Child ("African Children's Charter"). The African Children's Charter is also binding on States Parties. According to article 1, States Parties "shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be

⁴⁴ CENTER FOR HUMAN RIGHTS, *supra* note 43, at 8–9.

⁴⁵ CENTER FOR HUMAN RIGHTS, *supra* note 43, at 9.

⁴⁶ CONSTITUTION OF THE REPUBLIC OF BÉNIN, 1990, at pmb. Emphasis added.

⁴⁷ CENTER FOR HUMAN RIGHTS, *supra* note 43, at 9.

necessary to give effect to the provisions of this Charter.”⁴⁸ The African Children’s Charter also addresses customary and traditional practices and states that “[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties, and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.”⁴⁹

The African Children’s Charter was “inspired by several regional concerns germane to the continent of Africa and which were not covered by the African Charter of 1981.”⁵⁰ Of particular importance to the drafters of the African Children’s Charter “were issues around child trafficking, use of child soldiers in armed conflicts, harmful cultural and traditional practices as well as several other [localized] anti-human rights practices within the domain of many African countries.”⁵¹ It was argued at the time that these issues had not been adequately “articulated by the African Charter [on Human and Peoples’ Rights] and existing international and regional bill of rights” and this “highlighted the need for a context-driven and context-specific norm for the promotion and protection of the rights and welfare of the African Child.”⁵² Of particular note is the fact that the African Children’s Charter also established “the African Committee of Experts on the Rights and Welfare of the Child . . . within the OAU to promote and protect the rights stipulated in the African Children’s Charter.”⁵³

In the African countries, as is the case with countries in other parts of the world, “[a] State can, through its constitution, put to rest any doubts as to whether international law, including customary international law, is law within its national jurisdiction.”⁵⁴ The Constitution of the Republic of South Africa (“S. Afr. Const.”), for example, directly addresses the applicability of both *international law* and

⁴⁸ African Charter on the Rights and Welfare of the Child (African Children’s Charter), OAU Doc. CAB/LEG/24.9/49 (1990), art. 1.

⁴⁹ African Children’s Charter, *supra* note 48, art. 3.

⁵⁰ CENTER FOR HUMAN RIGHTS, *supra* note 43, at 51.

⁵¹ CENTER FOR HUMAN RIGHTS, *supra* note 43, at 51.

⁵² CENTER FOR HUMAN RIGHTS, *supra* note 43, at 51.

⁵³ CENTER FOR HUMAN RIGHTS, *supra* note 43, at 51.

⁵⁴ Mbaku, *supra* note 25, at 72.

customary international law in the country's domestic courts.⁵⁵ Article 232 of the S. Afr. Const. deals specifically with customary international law and states that “[c]ustomary international law is law in the Republic [of South Africa] unless it is inconsistent with the Constitution or an Act of Parliament.”⁵⁶ The issue of the applicability of international law in South African courts is dealt with in Article 233, which states that “[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”⁵⁷

When South Africans undertook to design a constitution for themselves in the aftermath of the collapse of the dreaded apartheid system, they “voluntarily opted to allow international law to infringe on their sovereign right to determine the content of their constitutional law in an effort to enhance and improve the protection of human and peoples’ rights, as well as create, within the country, a culture that respects and protects human rights.”⁵⁸ Many scholars have lauded South Africa’s emerging rights jurisprudence, particularly its application of international law.⁵⁹ While provisions in the South African Constitution have significantly enhanced the ability of the country’s courts—particularly, the Constitutional Court—to develop a “body of human rights jurisprudence that has gained international prominence,”⁶⁰ many other countries in the continent “do not provide such explicit approval of the use of international sources for domestic jurisprudence.”⁶¹

Nevertheless, many African countries have been able to overcome the constraints that “nonincorporation would normally impose through their use of international human rights instruments as

⁵⁵ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA NO. 108 OF 1996. This is the country’s permanent, post-apartheid constitution.

⁵⁶ S. AFRI. CONST., 1996, *supra* note 55, § 232.

⁵⁷ S. AFRI. CONST., 1996, *supra* note 55, § 232.

⁵⁸ Mbaku, *supra* note 25, at 73.

⁵⁹ Richard Cameron Blake, *The World’s Law in One Country: The South African Constitutional Court’s Use of Public International Law*, 115 S. AFR. L. J. 668 (1999).

⁶⁰ Adjami, *supra* note 28, at 112.

⁶¹ Adjami, *supra* note 28, at 112.

persuasive authority in national court decisions.”⁶² For example, courts in Ghana, a country, which, unlike South Africa, has not provided through its constitution, “explicit approval of the use of international sources for domestic jurisprudence,”⁶³ have overcome the obstacles brought about by nonincorporation by adopting what has been referred to as the “transjudicial model.”⁶⁴ Adjami argues that “[t]he transjudicial model accounts for the actual use of international law and comparative case law in domestic courts, regardless of the binding or nonbinding status of their sources.”⁶⁵ This approach to the interpretation of national constitutional law, it is argued, produces a “cross-fertilization of international law and comparative case law in domestic courts in continents around the globe,” including Africa.⁶⁶ It is argued that transjudicialism has significantly improved dialogue across the world’s judicial systems, as well as, judicial comity.⁶⁷ Below, we examine cases from a few African countries to determine how judges have utilized international and comparative law sources as tools for interpreting national constitutional law and legislative acts.

A. Republic of Ghana

Although Ghanaian courts, have, as a result of the country’s dualist approach to international law, “demonstrated some restraint in their articulation of international law rules and principles,” they have, nevertheless, been “striving to defeat the constraints imposed [on the

⁶² Adjami, *supra* note 28, at 112.

⁶³ Adjami, *supra* note 28, at 112.

⁶⁴ Adjami, *supra* note 28, at 112. *See also* Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994) (noting, *inter alia*, that “transjudicial communication” can significantly strengthen international regimes, such as human rights treaties,” as well as, enhance the “dissemination of ideas from one national legal system to another, from one regional legal system to another, or from the international legal system or a particular regional legal system to national legal systems”). Slaughter, *id.* at 117.

⁶⁵ Adjami, *supra* note 28, at 112–113.

⁶⁶ Adjami, *supra* note 28, at 113. *See also* Slaughter, *supra* note 64, at 117–118 (elaborating, *inter alia*, the concept of cross-fertilization).

⁶⁷ Adjami, *supra* note 28, at 112. *See also* The Honorable Claire L’Heureux-Dubé, *Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 40 (1998) (noting, *inter alia*, “the place of all courts in the global dialogue on human rights and other common legal questions”).

country's legal system] by [the country's] dualist posture in the course of adjudicating cases.”⁶⁸ For example, in the case, *New Patriotic Party v. Inspector General of Police*,⁶⁹ the Ghanaian Supreme Court was called upon to rule on the constitutionality of provisions of the Ghana Public Order Decree, 1972, which granted the Minister of the Interior, inter alia, the power to impose restrictions on the freedom of assembly, and whether individuals holding a meeting to celebrate a traditional custom should obtain prior “consent” or “permit” of the Minister of the Interior.⁷⁰

Ghana's Supreme Court found that § 7 of the Public Order Decree, 1972, was in violation of the Constitution of Ghana, specifically, § 21, which defines “general fundamental freedoms,” which include “freedom of assembly including freedom to take part in processions and demonstrations.”⁷¹ The Court also determined that § 7 of the Public Order Decree also violated article 11 of the African Charter on Human and Peoples' Rights, which guarantees the “right to assembly.”⁷² To the leading judgment of Hayfron-Benjamin, J., Archer, C.J., added the following declaration:

Ghana is a signatory to [the African Charter on Human and Peoples' Rights] and Member States of the Organization of African Unity and parties to the Charter are expected to recognize the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. I do not think the fact that Ghana has not passed specific legislation to give effect to the Charter, [means that] the Charter cannot be relied upon. On the contrary, Article 21 of our Constitution

⁶⁸ Christian N. Okeke, *The Use of International Law in the Domestic Courts of Ghana and Nigeria*, 32 ARIZ. J. INT'L & COMP. L. 371, 409 (2015).

⁶⁹ *New Patriotic Party v. Inspector-General of Police*, [1993–94] 2 GLR 459 SC (Nov. 30, 1993).

⁷⁰ *New Patriotic Party v. Inspector-General of Police*, *supra* note 69, at 459. See also Frans Viljoen, *Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa*, 43 J. AFR. L. 1, 5 (1999).

⁷¹ CONST. OF GHANA, § 21(d).

⁷² AFRICAN (BANJUL) CHARTER, art. 11.

has recognized the right to assembly mentioned in Article 11 of the African [Banjul] Charter.⁷³

B. Republic of Botswana

Courts in Botswana have also relied on international human rights instruments that have been ratified by Botswana to inform their interpretation of national constitutional provisions. In *Attorney-General v. Unity Dow*,⁷⁴ Amissah, JP, writing for the Court of Appeal, noted that “[t]he learned judge a quo [had] referred to the international obligations of Botswana in his judgment in support of his decision that sex-based discrimination was forbidden under the Constitution [of Botswana].”⁷⁵ Noting that the appellant had objected to the ruling of the judge a quo,⁷⁶ Amissah, JP declared that “by the law of Botswana, relevant international treaties and conventions, may be referred to as an aid to interpretation.”⁷⁷ The learned judge then cited to § 24 of Botswana’s Interpretation Act, which states that as “an aid to the construction of the enactment a court may have regard to . . . any relevant international treaty, agreement or convention.”⁷⁸

In objecting to the ruling of the judge a quo, the appellant, nevertheless, “conceded [to the Court of Appeal] that international

⁷³ Quoted in Okeke, *supra* note 68, at 411–412. Also quoted in Viljoen, *supra* note 70, at 5. Also see Okeke, *supra* note 68, at 411–412. Viljoen cautions, however, that the reliance of the Ghanaian Supreme Court on the African (Banjul) Charter in *New Patriotic Party v. Inspector-General of Police* may “not necessarily form a pattern in judicial interpretation” in Ghana given the fact that “[i]n another decision handed down on the same day, *New Patriotic Party v. Ghana Broadcasting Corporation*, pertaining to the right to information, no reference is made to the African Charter.” See Viljoen, *supra* note 70, at 6. Nevertheless, Viljoen notes that there is reason “for optimism about the increased role of the Charter in the fact that a high-ranking [Ghanaian] government official, the attorney-general, [had] referred to a provision of the Charter during a case.” See Viljoen, *supra* note 70, at 6.

⁷⁴ *Attorney-General v. Unity Dow*, [1992] LRC (Const.) 623.

⁷⁵ *Attorney-General v. Unity Dow*, 1992 BLR 119, 151 (CA).

⁷⁶ That is the judgment of Horwitz, J of the High Court of Botswana in *The Attorney-General of the Republic of Botswana v. Unity Dow*, (Unreporter) MISCA 124/90, June 3, 1990.

⁷⁷ *Unity Dow*, *supra* note 75, at 151.

⁷⁸ *Unity Dow*, *supra* note 75, at 151.

treaties and conventions may be used as an aid to interpretation.”⁷⁹ However, he objected to the use, “by the learned judge, a quo of the African Charter on Human and Peoples’ Rights, the Convention for the Protection of Human Rights and Freedoms, and the Declaration on the Elimination of Discrimination Against Women . . . on two grounds.”⁸⁰ The first ground was that “none of [these treaties] had been incorporated into the domestic law by legislation, although international treaties became part of the law only when so incorporated”; and the second was that “treaties were only of assistance in interpretation when the language of the statute under consideration was unclear.”⁸¹ Amissah, JP, writing for the Court of Appeal, noted that “[a]ccording to the appellant’s argument, of the treaties referred to by the learned judge a quo, Botswana had ratified only the African Charter on Human and Peoples’ Rights, but had not incorporated it into domestic law. That, the appellant admitted, however, did not deny that particular Charter the status of an aid to interpretation.”⁸²

The second objection offered by the appellant, stated Amissah, JP, “was that treaties were only of assistance in interpretation when the language of the statute under consideration was unclear.”⁸³ In rejecting the appellant’s objections, Amissah, JP noted that:

[e]ven if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the State until Parliament has legislated its provisions into the law of the land, in so far as such construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution.⁸⁴

⁷⁹ Unity Dow, *supra* note 75, at 151.

⁸⁰ Unity Dow, *supra* note 75, at 151.

⁸¹ Unity Dow, *supra* note 75, at 151–152.

⁸² Unity Dow, *supra* note 75, at 151.

⁸³ Unity Dow, *supra* note 75, at 151–152.

⁸⁴ Unity Dow, *supra* note 75, at 153.

Amissah, JP went on to state that:

[t]he reference made by the judge a quo to these materials [i.e., international treaties and conventions to which Botswana is a State Party] amounted to nothing more than that. What he had said at p. A245c was: “I am strengthened in my view by the fact that Botswana is a signatory to the O.A.U. Convention on Non-Discrimination. I bear in mind that signing the Convention does not give it the power of law in Botswana but the effect of the adherence by Botswana to the Convention must show that a construction of the section which does not do violence to the language but is consistent with and in harmony with the Convention must be preferable to a ‘narrow construction’ which results in a find that section 15 of the Constitution permits unrestricted discrimination on the basis of sex.”⁸⁵

With respect to the African (Banjul) Charter, Amissah, JP noted that Botswana is a signatory to the Charter and that the State is, in fact, “one of the credible prime movers behind the promotion and supervision of the Charter.”⁸⁶ Amissah, JP then went on to concede that the African (Banjul) is not binding “within Botswana as legislation passed by its Parliament.”⁸⁷ Nevertheless, domestic legislation in Botswana should be interpreted “so as not to conflict with Botswana’s obligations under the Charter or other international obligations.”⁸⁸ Amissah, JP concluded the discussion of the appellant’s objections by making the following observation:

I am in agreement that Botswana is a member of the community of civilized States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which

⁸⁵ Unity Dow, *supra* note 75, at 154.

⁸⁶ Unity Dow, *supra* note 75, at 153.

⁸⁷ Unity Dow, *supra* note 75, at 154.

⁸⁸ Unity Dow, *supra* note 75, at 154.

conflicts with the international obligations Botswana has undertaken. This principle, used as an aid to construction as is quite permissive under section 24 of the Interpretation Act, adds reinforcement to the view that the intention of the framers of the Constitution could not have been to permit discrimination purely on the basis of sex.⁸⁹

C. Republic of Namibia

Namibia adopted a new constitution in February 1990,⁹⁰ and formally became an independent country on March 21, 1990. Subsequently, on July 30, 1992, the Government of Namibia ratified the African (Banjul) Charter on Human and Peoples' Rights.⁹¹ In *Kauesa v. Minister of Home Affairs & Others, the High Court of Namibia*,⁹² a case brought before the Namibian High Court in 1994, the applicant, Elvis Kauesa, a warrant officer in the Namibian Police, questioned the constitutionality of "Reg. 58(2), which had been published under Government Notice R203 in Government Gazette 719 dated 14 February 1964."⁹³ Specifically, Kauesa sought:

a declaratory order against the Minister of Home Affairs as first respondent, the Inspector-General of the Namibian Police as second respondent, and the Deputy Commissioner of the Namibian Police as third respondent, in the following terms:

1. Declaring reg 58(32), published under Government Notice R203 in Government Gazette 719 date 14 February 1964, to be invalid and without force and effect.

⁸⁹ *Unity Dow*, *supra* note 75, at 154.

⁹⁰ CONST. REP. OF NAMIBIA, 1990 (WITH AMENDMENTS 2010).

⁹¹ African Union, *African Charter on Human and Peoples' Rights: Status List*, <https://au.int/en/treaties/african-charter-human-and-peoples-rights> (Oct. 7, 2019).

⁹² *Kauesa v. Minister of Home Affairs & Others, the High Court of Namibia*, 1995 (1) 51 (NM).

⁹³ *Kauesa*, *supra* note 92, at 53.

2. Ordering such respondents as may oppose this application to pay the costs thereof, jointly and severally.

3. Granting the applicant such further and/or alternative relief as this honorable Court deems fit.⁹⁴

O'Linn, J., writing for the Court, started the analysis of the case by noting that “[w]hen considering the constitutionality of provisions of statute law, our Courts must in the first place rely on the Namibian Constitution, and not on that of other countries with constitutions fundamentally different.”⁹⁵ The learned judge then added that “[a]fter all, art 1(6) [of the Constitution of Namibia] provides:⁹⁶ ‘This Constitution shall be the Supreme Law of Namibia.’”⁹⁷

From the applicant’s “founding affidavit,” the Court determined that he relied “for his attack on the validity of the regulation on the ground that the regulation [Reg. 58(32)] is now in conflict with his ‘fundamental right’ to freedom of speech and expression expressed in art 21(1)(a) of the Constitution [of Namibia].”⁹⁸ Kauesa, the applicant, asserted in his founding affidavit, that:

I submit that I and other members of the police have the constitutionally protected right to engage in discussion or debate in a public sense on issue of such legitimate public concern about the administration of the force, conditions of service and other issues of public importance such as corruption or irregularities, even if such comment can be construed as unfavorable. In participating in the televised discussion

⁹⁴ Kauesa, *supra* note 92, at 53.

⁹⁵ Kauesa, *supra* note 92, at 55.

⁹⁶ Kauesa, *supra* note 92, at 55.

⁹⁷ CONST. REP. OF NAMIBIA, art. 1(6).

⁹⁸ Kauesa, *supra* note 92, at 55. Article 21(a) of the Namibian Constitution states as follows: “All persons shall have the right to: (a) freedom of speech and expression, which shall include freedom of the press and other media.” CONST. REP. OF NAMIBIA, art. 21(1)(a).

aforesaid, I respectfully submit that I was lawfully exercising this right.⁹⁹

O'Linn, J., cited to a case from the U.S. Court of Appeals of the Seventh Circuit and noted that in *Choudry v. Jenkins*,¹⁰⁰ the majority “quoted without criticism . . . [a] dictum of Judge Grant in the Court a quo:¹⁰¹ ‘Open comment by a public employee which is false and made with knowledge of its falsity or with reckless disregard of its truth, constitutes an unpermissible form of expression.’”¹⁰² In analyzing the case, O'Linn, J., made reference to several international and national instruments, including the Canadian Charter of Rights and Freedoms,¹⁰³ the European Convention on Human Rights,¹⁰⁴ Universal Declaration of Human Rights of 1948,¹⁰⁵ and the African (Banjul) Charter on Human and Peoples' Rights.¹⁰⁶ Then, the learned judge moved on to deal with the issue of the applicability of international law and agreements in Namibian courts. In doing so, O'Linn J., went directly to Article 143 of the Constitution of Namibia, which provides that: “All existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly acting under Article 63(2)(d) hereof otherwise decides.”¹⁰⁷

⁹⁹ Kauesa, *supra* note 92, at 57.

¹⁰⁰ *Choudry v. Jenkins*, 559 F. 2d 1085 (7th Cir. 1977).

¹⁰¹ Kauesa, *supra* note 92, at 70.

¹⁰² Kauesa, *supra* note 92, at 70. Grant J.'s quote can be found at *Choudry v. Jenkins*, 559 F 2d 1085, 1088 (1977).

¹⁰³ Kauesa, *supra* note 92, at 72.

¹⁰⁴ Kauesa, *supra* note 92, at 75.

¹⁰⁵ Kauesa, *supra* note 92, at 82.

¹⁰⁶ Kauesa, *supra* note 92, at 86.

¹⁰⁷ CONST. REP. OF NAMIBIA, art. 143. Article 63(2)(d) deals with the power of the National Assembly in the post-independence period to deal with international obligations that were made on behalf of Namibia when it was a colony and was then known as South West Africa. Hence, Article 63(2)(d) states as follows: “The National Assembly shall further have the power and function, subject to this Constitution: d. to consider and decide whether or not to succeed to such international agreements as may have been entered into prior to independence by administrations within Namibia in which the majority of the Namibian people have historically not enjoyed democratic representation and participation.” *See* CONST. REP. OF NAMIBIA, art. 63(2)(d).

The learned judge then moved on to Article 144 of the Constitution of Namibia, which deals specifically with international law and which states that:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.¹⁰⁸

O'Linn, J., then noted that "[t]he Namibian Government [had], as far as can be established, formally recognized the African Charter in accordance with art 143 read with art 63(2)(d) of the Namibian Constitution."¹⁰⁹ As a consequence, argued O'Linn, J., "[t]he provisions of the Charter have therefore become binding on Namibia and form part of the law of Namibia in accordance with art 143, read with art 144 of the Namibian Constitution."¹¹⁰ However, argued the learned judge,

[i]t is questionable . . . whether the aforesaid 1982 agreement and the Universal Declaration of Human Rights have become part of the law of Namibia. *But, even if they are not, their provisions should carry weight when interpreting provisions of the Namibian Constitution, such as those which are relevant to the issues in this case and which are discussed or interpreted in the course of this judgment.*¹¹¹

On this basis, the High Court rejected and dismissed the applicant's application for a declaratory order with costs.¹¹² Kauesa, however, appealed the High Court's decision to the Supreme Court of Namibia.¹¹³ The Supreme Court began its analysis of the appeal by providing an overview of the judgment of the Court a quo. Of specific

¹⁰⁸ Kauesa, *supra* note 92, at 86.

¹⁰⁹ Kauesa, *supra* note 92, at 86.

¹¹⁰ Kauesa, *supra* note 92, at 86.

¹¹¹ Kauesa, *supra* note 92, at 86. Emphasis added.

¹¹² Kauesa, *supra* note 92, at 120.

¹¹³ Kauesa v. Minister of Home Affairs, (SA 5/94) [1995] NASC 3 (Oct. 11, 1995).

interest to the appeal is the Court a quo's judgment that "the Regulation [i.e., Reg. 58(32) of the Police Force] complies with the provisions of Article 21(2) of the Namibian Constitution in that it: (i) imposes reasonable restrictions on the exercise of the rights and freedoms contained in Sub-Article (1) of Article 21, including on the freedom of speech and expression; (ii) the restrictions are necessary in a democratic society; and (iii) are required in the interest of sovereignty and integrity of Namibia, national security and public order."¹¹⁴

The Supreme Court then examined judgments from courts in the United States, the United Kingdom, India, Canada, as well as, the European Court of Human Rights, on cases dealing with the suppression of free speech. Dumbutshena AJA, writing for the Court, made specific reference to the judgment delivered by Dickson CJ and Lamer and Wilson JJ of the Supreme Court of Canada in the case, *Re Singh and Minister of Employment & Immigration and 6 Other Appeals*,¹¹⁵ which dealt with limitations on rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms.¹¹⁶

Dumbutshena AJA also cited to the European Court of Human Rights' decision in the *Case of Handyside v. The United Kingdom*,¹¹⁷ and made specific reference to the following section in that judgment:

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterizing a "democratic society." Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or

¹¹⁴ Kauesa v. Minister of Home Affairs, *supra* note 113, at 5.

¹¹⁵ *Re Singh and Minister of Employment & Immigration and 6 Other Appeals*, [1985] 1 S.C.R. 177.

¹¹⁶ Kauesa v. Minister of Home Affairs, *supra* note 113, at 20–21.

¹¹⁷ *Case of Handyside v. The United Kingdom* (Application no. 5493/72), Strasbourg, December 7, 1976.

disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society.” This means, amongst other things, that every “formality,” “condition,” “restriction” or “penalty” imposed in this sphere must be proportionate to the legitimate aim pursued.¹¹⁸

Dumbutshena AJA then noted that:

[i]n the context of Namibia freedom of speech is essential to the evolutionary process set up at the time of independence in order to rid the country of apartheid and its attendant consequences. In order to live in and maintain a democratic state the citizens must be free to speak, criticize and praise where praise is due. Muted silence is not an ingredient of democracy because the exchange of ideas is essential to the development of democracy.¹¹⁹

The learned justice then went on to cite to several U.S. Supreme Court cases that deal specifically with limitations on “the right to free speech.”¹²⁰

Like the High Court, the Supreme Court of Namibia utilized international and comparative law sources as an aid in its interpretation of national constitutional law and declared “Regulation 58(32) published under Government Notice R203 in Government Gazette 791, dated 14 February 1964 invalid and without force and effect in law.”¹²¹ The Court concluded that “Regulation 58(32) is in our view

¹¹⁸ Case of Handyside, *supra* note 117, at para. 49. Dumbutshena AJA also made reference to the European Court’s decision in *The Sunday Times v. The United Kingdom* (1979) 2 EHRR 245, App. No. 6538/74 (1979), a case that also dealt with issues of restrictions on individual rights and freedoms.

¹¹⁹ *Kauesa v. Minister of Home Affairs*, *supra* note 113, at 28.

¹²⁰ Some of these include *Roth v. United States*, 354 U.S. 476 (1957); *Chaplinsky v. State of New Hampshire*, 315 U.S. 588 (1942); *Spence v. Washington*, 418 U.S. 405 (1974); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *New York Times Company v. Sullivan*, 376 U.S. 254 (1964).

¹²¹ *Kauesa v. Minister of Home Affairs*, *supra* note 113, at 40.

inconsistent with Article 21(1) and (2) of the Constitution [of Namibia] and we do not consider this to be a proper case to exercise the discretionary power conferred by Article 25(1)(a).”¹²²

D. Republic of South Africa

In one of the earliest cases decided by the post-apartheid Constitutional Court of South Africa, the Court was called upon to decide on the constitutionality of the death penalty.¹²³ Chaskalson P, in his leading judgment, made references to several international human rights instruments. The two individuals accused in this case were convicted “in the Witwatersrand Local Division of the Supreme Court on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances.”¹²⁴ The convicted persons were subsequently sentenced to death “on each of the counts of murder and to long terms of imprisonment on other counts.”¹²⁵ They then appealed their convictions to the Appellate Division of the Supreme Court, which subsequently dismissed “the appeals against the sentences on the counts of attempted murder and robbery, but postponed the further hearing of the appeals against the death sentence until the constitutional issues are decided by this Court.”¹²⁶

Chaskalson P noted that the trial was concluded before South Africa’s Interim Constitution (1993) came into force and, as a consequence, “the constitutionality of the death sentence did not arise at the trial.”¹²⁷ The learned justice also stated that “[i]t would have been better if the framers of the Constitution had stated specifically, either that the death sentence is not a competent penalty, or that it is permissible in circumstances permitted by law.”¹²⁸ Since South Africa’s post-apartheid framers did not deal specifically with the death sentence, continued Chaskalson P, it was incumbent upon the

¹²² *Kauesa v. Minister of Home Affairs*, *supra* note 113, at 40.

¹²³ *The State v. Makwanyane and Another* (CCT3/94) [1995] ZACC 3.

¹²⁴ *S. v. Makwanyane*, *supra* note 123, at para. 1.

¹²⁵ *S. v. Makwanyane*, *supra* note 123, at para. 1.

¹²⁶ *S. v. Makwanyane*, *supra* note 123, at para. 3.

¹²⁷ *S. v. Makwanyane*, *supra* note 123, at para. 4.

¹²⁸ *S. v. Makwanyane*, *supra* note 123, at para. 5.

Constitutional Court (“CC”) “to decide whether the penalty is consistent with the provisions of the Constitution.”¹²⁹

The two issues raised in the appeal to the CC were: (1) “the constitutionality of *section 277(1)(a)* of the Criminal Procedure Act, and the implications of *section 241(8)* of the Constitution.”¹³⁰ While no formal reference was made to the CC “in terms of *section 102(6)* of the Constitution,” Chaskalson P noted that “that was implicit in the judgment of the Appellate Division, and was treated as such by the parties.”¹³¹

While South Africa’s 1993 Constitution was a transitional constitution, it was, nevertheless, one that established:

a new order in South Africa; an order in which human rights and democracy are entrenched and in which the Constitution: “ . . . shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary application in this Constitution, be of no force and effect to the extent of the inconsistency.”¹³²

Chaskalson P then proceeded to examine other sections of the South African Interim Constitution that dealt with fundamental rights, as well as its own case law interpreting these rights.¹³³

Next, Chaskalson P examined international and comparative law sources dealing with the death penalty. The learned justice states that “[c]ustomary international law and the ratification and accession to international agreements is dealt with in section 231 of the Constitution which sets the requirements for such law to be binding

¹²⁹ S. v. Makwanyane, *supra* note 123, at para. 5.

¹³⁰ S. v. Makwanyane, *supra* note 123, at para. 3. Emphasis in original.

¹³¹ S. v. Makwanyane, *supra* note 123, at para. 3. Emphasis in original.

¹³² S. v. Makwanyane, *supra* note 123, at para. 7.

¹³³ S. v. Makwanyane, *supra* note 123, at para. 9.

within South Africa”¹³⁴ and that “[i]n the context of *section 35(1)*, public international law would include non-binding as well as binding law.”¹³⁵ Chaskalson P noted that international agreements and customary international law would be utilized as tools of interpretation.¹³⁶

Specifically, Chaskalson P noted that the

[i]nternational agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialized agencies such as the International Labor Organization may provide guidance as to the correct interpretation of particular provisions of Chapter Three.¹³⁷

Public international law, argues Chaskalson P, does not prohibit capital punishment.¹³⁸ International human rights instruments, the learned justice continued, “differ . . . from our Constitution in that where the right to life is expressed in unqualified terms they either deal specifically with the death sentence, or authorize exceptions to be made to the right to life by law.”¹³⁹ This, continued the learned justice, “has influenced the way international tribunals have dealt with issues relating to capital punishment, and is relevant to a proper understanding of such decisions.”¹⁴⁰

¹³⁴ ACT NO. 200 OF 1993: CONST. REP. SOUTH AFRICA (INTERIM CONST.), § 231.

¹³⁵ *S. v. Makwanyane*, *supra* note 123, at para. 35.

¹³⁶ *S. v. Makwanyane*, *supra* note 123, at para. 35. *See also* ACT NO. 200 OF 1993, *supra* note 134, § 35(1).

¹³⁷ *S. v. Makwanyane*, *supra* note 123, at para. 35.

¹³⁸ *S. v. Makwanyane*, *supra* note 123, at para. 36.

¹³⁹ *S. v. Makwanyane*, *supra* note 123, at para. 36.

¹⁴⁰ *S. v. Makwanyane*, *supra* note 123, at para. 36.

The CC then moved on to examine several judicial decisions from the United States that deal with capital punishment and stated that “[t]he earliest litigation on the validity of the death sentence seems to have been pursued in the courts of the United States of America.”¹⁴¹ Chaskalson P argues further that “[a]lthough challenges under state constitutions to the validity of the death sentence have been successful [in the United States], the federal constitutionality of the death sentence as a legitimate form of punishment for murder was affirmed by the United States Supreme Court in *Gregg v. Georgia*.”¹⁴²

Chaskalson P states that in *Gregg*, Brennan, J., in a dissenting opinion, held that

[t]he fatal constitutional infirmity in the punishment of death is that it treats “members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.”¹⁴³

Chaskalson P then went on to state that “[t]he weight given to human dignity by Justice Brennan is wholly consistent with the values of our Constitution and the new order established by it. It is also consistent with the approach to extreme punishments followed by courts in other countries.”¹⁴⁴

Chaskalson P next turns to a decision of the German Federal Constitutional Court (“FCC”) in a case involving life imprisonment and makes special note of a part of the decision dealing with “respect for human dignity.”¹⁴⁵ In that case, Germany’s FCC noted that “[r]espect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn

¹⁴¹ S. v. Makwanyane, *supra* note 123, at para. 40.

¹⁴² S. v. Makwanyane, *supra* note 123, at para. 41. *See also* *Gregg v. Georgia*, 428 U.S. 153, 171 (1976).

¹⁴³ *Gregg*, *supra* note 142, at 230.

¹⁴⁴ S. v. Makwanyane, *supra* note 123, at para. 58.

¹⁴⁵ [1977] 45 BVerfGE 187, 228. *See* S. v. Makwanyane, *supra* note 123, at para. 59.

the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect.”¹⁴⁶

The fact that capital punishment, argues Chaskalson P, “constitutes a serious impairment of human dignity has also been recognized by judgments of the Canadian Supreme Court.”¹⁴⁷ In *Kindler v. Canada*,¹⁴⁸ the “appellant was found guilty of first degree murder, conspiracy to commit murder and kidnapping in the State of Pennsylvania and the jury recommended the imposition of the death penalty.”¹⁴⁹ Nevertheless, before the court could impose the sentence, “the appellant escaped from prison and fled to Canada where he was arrested.”¹⁵⁰ After the usual judicial proceedings, the Canadian Minister of Justice ordered that the appellant should be extradited to the United States “pursuant to s.25 of the Extradition Act without seeking assurances from the U.S., under Art. 6 of the Extradition Treaty between the two countries, that the death penalty would not be imposed or, if imposed, not carried out.”¹⁵¹ The appellant appealed the Minister’s decision, but both “the Trial Division and the Court of Appeal of the Federal Court dismissed appellant’s application to review the Minister’s decision.”¹⁵² The Supreme Court of Canada was called upon to “determine whether the Minister’s decision to surrender the appellant to the U.S., without first seeking assurances that the death penalty will not be imposed or executed, violates the appellant’s rights under s. 7 or s. 12 of the *Canadian Charter of Rights and Freedoms*.”¹⁵³

Lamer C.J. and Sopinka and Cory JJ dissenting, dismissed the appeal and confirmed the extradition order. Nevertheless, in doing so, they noted that the death penalty is “the supreme indignity to the individual, the ultimate corporal punishment, the final and complete lobotomy and the absolute and irrevocable castration. [It is] the

¹⁴⁶ Quoted in *S. v. Makwanyane*, *supra* note 123, at para. 59.

¹⁴⁷ *S. v. Makwanyane*, *supra* note 123, at para. 60.

¹⁴⁸ *Kindler v. Canada* (Minister of Justice) (1991) 2 SCR 779.

¹⁴⁹ *Kindler*, *supra* note 148, at 780.

¹⁵⁰ *Kindler*, *supra* note 148, at 780.

¹⁵¹ *Kindler*, *supra* note 148, at 780.

¹⁵² *Kindler*, *supra* note 148, at 780.

¹⁵³ *Kindler*, *supra* note 148, at 780.

ultimate desecration of human dignity.”¹⁵⁴ Chaskalson P noted that in their ruling,

the majority of the [Supreme Court of Canada] held that the validity of the order for extradition did not depend upon the constitutionality of the death penalty in Canada, or the guarantee in its Charter of Rights against cruel and unusual punishment. The Charter was concerned with legislative and executive acts carried out in Canada, and an order for extradition neither imposed nor authorized any punishment within the borders of Canada.¹⁵⁵

Chaskalson P went on to note that the issue in “*Kindler*’s case was whether the action of the Minister of Justice, who had authorized the extradition without any assurance that the death penalty would not be imposed was constitutional.”¹⁵⁶ The learned justice then stated that:

[i]n balancing the international obligations of Canada in respect of extradition, and another purpose of the extradition legislation—to prevent Canada from becoming a safe haven for criminals, against the likelihood that the fugitives would be executed if returned to the United States, the view of the majority was that the decision to return the fugitives to the United States could not be said to be contrary to the fundamental principles of justice.¹⁵⁷

The two fugitives, Ng and Kindler, then took their case to the UN Human Rights Committee (“UNHRC”) and argued “that Canada had breached its obligations under the International Covenant on Civil and Political Rights.”¹⁵⁸ While noting that “by definition, every execution of death may be considered to constitute cruel and inhuman

¹⁵⁴ Kindler, *supra* note 148, at 780. This is the part of the judgment in *Kindler* that Chaskalson P relied on.

¹⁵⁵ S. v. Makwanyane, *supra* note 123, at para. 61.

¹⁵⁶ S. v. Makwanyane, *supra* note 123, at para. 62.

¹⁵⁷ S. v. Makwanyane, *supra* note 123, at para. 62.

¹⁵⁸ S. v. Makwanyane, *supra* note 123, at para. 63.

treatment within the meaning of article 7 of the [International Covenant on Civil and Political Rights],”¹⁵⁹ the UNHRC also made reference to Article 6(2) of the Covenant, which permits, with some qualifications, the imposition of the death penalty “for the most serious crimes.”¹⁶⁰ Chaskalson P then noted that

[i]n view of these provisions, the majority of the [UNHRC] were of the opinion that the extradition of fugitives to a country which enforces the death sentence in accordance with the requirements of the International Covenant [on Civil and Political Rights], should not be regarded as a breach of the obligations of the extraditing country.¹⁶¹

From the examination of the cases of the two fugitives—Ng and Kindler—before the UN Human Rights Committee, Chaskalson P concluded that:

[d]espite these differences of opinion, what is clear from the decisions of the Human Rights Committee of the United Nations is that the death penalty is regarded by it as cruel and inhuman punishment within the ordinary meaning of those words, and that it was because of the specific provisions of the International Covenant authorizing the imposition of capital punishment by member States in certain circumstances, that the words had to be given a narrow meaning.¹⁶²

Chaskalson P then moved on to examine decisions of cases decided under the European Convention on Human Rights (“ECHR”) by the European Court of Human Rights (“ECtHR”). The learned

¹⁵⁹ *Quoted in S. v. Makwanyane*, *supra* note 123, at para. 63. *See also* Chitat Ng v. Canada, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994), at para. 16.2.

¹⁶⁰ INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 999 U.N.T.S. 171 (1966), art. 6(2).

¹⁶¹ *S. v. Makwanyane*, *supra* note 123, at para. 64.

¹⁶² *S. v. Makwanyane*, *supra* note 123, at para. 67.

justice made reference specifically to *Soering v. United Kingdom*.¹⁶³ This case, like the *Kindler* case, involved the extradition to the United States, of a fugitive “to face murder charges for which capital punishment was a competent sentence.”¹⁶⁴ Soering (i.e., the applicant), a West German national, had:

alleged that the decision by UK Secretary State for the Home Department to extradite him to the United States of America to face trial in Virginia on a charge of capital murder would, if implemented, give rise to a breach by the United Kingdom of Article 3 [of the European Convention on Human Rights].¹⁶⁵

Chaskalson P noted that while Article 2 of the ECHR “protects the right to life,” it, nevertheless, “makes an exception in the case of ‘the execution of a sentence of a court following [the] conviction of a crime for which this penalty is provided by law.’”¹⁶⁶ The learned justice then noted that in *Soering*, the majority in the ECtHR “held that *article* 3 could not be construed as prohibiting all capital punishment, since to do so would nullify *article* 2.”¹⁶⁷ Nevertheless, argued Chaskalson P, it was

competent to test the imposition of capital punishment in particular cases against the requirements of *article* 3—the manner in which it is imposed or executed, the personal circumstances of the condemned person and the disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, were capable of bringing the

¹⁶³ *Soering v. United Kingdom*, Series A, No. 161; App. No. 14038/88; [1989] 11 EHRR 439.

¹⁶⁴ *S. v. Makwanyane*, *supra* note 123, at para. 68. *See also* *Soering*, *supra* note 163.

¹⁶⁵ *Soering*, *supra* note 163, Headnote/Summary. Article 3 of the ECHR states as follows: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” *See* COUNCIL OF EUROPE, EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL RIGHTS, AS AMENDED BY PROTOCOLS NOS. 11 AND 14, Nov. 1950, C.E.T.S. 5.

¹⁶⁶ *S. v. Makwanyane*, *supra* note 123, at para. 68.

¹⁶⁷ *S. v. Makwanyane*, *supra* note 123, at para. 68.

treatment or punishment received by the condemned person within the proscription.¹⁶⁸

Counsel for Soering argued that his extradition to the United States to face trial in the State of Virginia would expose him to the “risk of treatment going beyond the threshold set by *article 3* [of the European Convention on Human Rights].”¹⁶⁹ This assessment was based on “the youth of the fugitive (he was eighteen at the time of the murders), an impaired mental capacity, and the suffering on death row which could endure for up to eight years if he were convicted.”¹⁷⁰ Soering, who was a national of Germany, was also liable to be tried in Germany for the same offense. Chaskalson P noted that:

Germany, which has abolished the death sentence, also sought [the fugitive’s] extradition for the murders. There was accordingly a choice in regard to the country to which the fugitive should be extradited, and that choice should have been exercised in a way which would not lead to a contravention of *article 3*.¹⁷¹

Chaskalson P then added that:

[w]hat weighed with the [ECtHR] was the fact that the choice facing the United Kingdom was not a choice between extradition to a country which allows the death penalty and one which does not. *We are in a comparable position. A holding by us that the death penalty for murder is unconstitutional, does not involve a choice between freedom and death; it involves a choice between death in the very few cases which would otherwise attract that penalty under section 277(1)(a), and the severe penalty of life imprisonment.*¹⁷²

Chaskalson P then moved on to an examination of case law on the death penalty from India. Section 302 of the Indian Penal Code

¹⁶⁸ S. v. Makwanyane, *supra* note 123, at para. 68.

¹⁶⁹ S. v. Makwanyane, *supra* note 123, at para. 69.

¹⁷⁰ S. v. Makwanyane, *supra* note 123, at para. 69.

¹⁷¹ S. v. Makwanyane, *supra* note 123, at para. 69.

¹⁷² S. v. Makwanyane, *supra* note 123, at para. 69. Emphasis added.

permits the imposition of the death penalty for murder.¹⁷³ Nevertheless, Article 21 of the Constitution of India provides as follows: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”¹⁷⁴ The case *Bachan Singh v. State of Punjab*¹⁷⁵ offered the Supreme Court of India the opportunity to test the constitutionality of § 302 of the Indian Penal Code. Nevertheless, the wording of Article 21 of the Constitution of India, argues Chaskalson P, represented an obstacle “to a challenge to the death sentence, because there was a ‘law’ which made provision for the death sentence.”¹⁷⁶ In addition, argues Chaskalson P,

*article 72 of the Constitution [of India] empowers the President and Governors to commute sentences of death, and article 134 refers to the Supreme Court’s powers on appeal in cases where the death sentence has been imposed. It was clear, therefore, that capital punishment was specifically contemplated and sanctioned by the framers of the Indian Constitution, when it was adopted by them in November 1949.*¹⁷⁷

The Indian Supreme Court then took a look at international authorities “for and against the death sentence, and with the arguments concerning deterrence and retribution.”¹⁷⁸ After thoroughly reviewing arguments for and against the death sentence, the Court concluded that:

... the question whether or not [the] death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in

¹⁷³ Section 302 of the Penal Code of India states that “Whoever commits murder shall be punished with death, or [imprisonment for life], and shall also be liable to fine.” THE INDIAN PENAL CODE, 1860 ACT NO. 45 OF 1860 (Oct. 6, 1860), § 302.

¹⁷⁴ CONSTITUTION OF INDIA, art. 21.

¹⁷⁵ *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684.

¹⁷⁶ *S. v. Makwanyane*, *supra* note 123, at para. 72.

¹⁷⁷ *S. v. Makwanyane*, *supra* note 123, at para. 72.

¹⁷⁸ *S. v. Makwanyane*, *supra* note 123, at para. 76.

Section 302 of the Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners' argument that retention of [the] death penalty in the impugned provision, is totally devoid of reason and purpose.¹⁷⁹

Subsequently, the Supreme Court of India held that § 302 of the Indian Penal Code “violates neither the letter nor the ethos of Article 19.”¹⁸⁰ Chaskalson P then noted that, after making this conclusion, the Court then proceeded to deal with Article 21 and argued that “if that *article* 21 were to be expanded in accordance with the interpretative principle applicable to legislation limiting rights under Article 19(1), article 21 would have to be read as follows: ‘No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by a valid law.’”¹⁸¹

In its expanded form, argued the Supreme Court of India, the State could deprive an individual of his or her life by “fair, just and reasonable procedure.”¹⁸² With respect to the Constitution of the Republic of South Africa, Chaskalson P noted that the provisions of that constitution are different from those of the Constitution of India. The learned justice then argued that:

¹⁷⁹ Bachan Singh v. State of Punjab, (1980) 2 SCC 684, para. 132.

¹⁸⁰ Bachan Singh, *supra* note 179 at para. 132.

¹⁸¹ S. v. Makwanyane, *supra* note 123, at para. 77. *See also* Bachan Singh, *supra* note 179, at para. 136.

¹⁸² Specifically, the Supreme Court of India held that “[t]hus expanded and read for interpretative purposes, Article 21 clearly brings out the implication, that the founding fathers recognized the right of the State to deprive a person of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.” Bachan Singh, *supra* note 179, at para. 136.

[t]he question we have to consider is not whether the imposition of the death sentence for murder is ‘totally devoid of reason and purpose’, or whether the death sentence for murder ‘is devoid of any rational nexus’ with the purpose and object of *section 277(1)(a)* of the Criminal Procedure Act. It is whether in the context of our Constitution, the death penalty is cruel, inhuman or degrading, and if it is, whether it can be justified in terms of *section 33*.¹⁸³

Chaskalson P noted that the Indian Penal Code “leaves the imposition of the death sentence to the trial judge’s discretion.”¹⁸⁴ In *Bachan Singh*, the Court was also called upon to decide the “constitutionality of the legislation on the grounds of arbitrariness, along the lines of the challenges that have been successful in the United States.”¹⁸⁵ In its decision, the Supreme Court of India “rejected the argument that the imposition of the death sentence in such circumstances is arbitrary, holding that a discretion exercised judicially by persons of experience and standing, in accordance with principles crystallized by judicial decisions, is not an arbitrary discretion.”¹⁸⁶

Chaskalson P then examined case law dealing with the limitation of rights in Canada,¹⁸⁷ Germany,¹⁸⁸ and under the European Convention.¹⁸⁹ With respect to case law dealing with the limitation of rights guaranteed by the Canadian Charter of Rights, the learned justice noted that “there are differences between [the Interim Constitution of the Republic of South Africa]¹⁹⁰ and the Canadian Charter which have a bearing on the way in which *section 33* [of the Constitution of the

¹⁸³ S. v. Makwanyane, *supra* note 123, at para. 78.

¹⁸⁴ S. v. Makwanyane, *supra* note 123, at para. 79.

¹⁸⁵ S. v. Makwanyane, *supra* note 123, at para. 79.

¹⁸⁶ S. v. Makwanyane, *supra* note 123, at para. 79. *See also* Bachan Singh, *supra* note 179, at para. 165.

¹⁸⁷ S. v. Makwanyane, *supra* note 123, at paras. 104–107.

¹⁸⁸ S. v. Makwanyane, *supra* note 123, at para. 108.

¹⁸⁹ S. v. Makwanyane, *supra* note 123, at para. 109.

¹⁹⁰ CONST. REP. S. AFRICA, ACT 200 OF 1993.

Republic of South Africa]¹⁹¹ should be dealt with.”¹⁹² Chaskalson P also noted that, “[t]his is equally true of the criteria developed by other courts, such as the German Constitutional Court and the European Court of Human Rights.”¹⁹³ The learned justice then made the following statement:

”I see no reason this case . . . to attempt to fit our analysis into the Canadian pattern,” or for that matter to fit it into the pattern followed by any of the other courts to which reference has been made. Section 33 prescribes in specific terms the criteria to be applied for the limitation of different categories of rights and it is in the light of these criteria that the death sentence for murder has to be justified.¹⁹⁴

After reexamining the decision of the Appellate Division of the Supreme Court of South Africa in the case at bar, the Constitutional Court (“CC”) concluded that:

[t]he rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three [of the Interim Const. of the Rep. of South Africa].¹⁹⁵ By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an

¹⁹¹ CONST. REP. S. AFRICA, ACT 200 OF 1993, § 33.

¹⁹² *S. v. Makwanyane*, *supra* note 123, at para. 110. Section 33 of the INTERIM CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, deals with limitations on the rights guaranteed by the constitution. *See* CONST. REP. S. AFRICA, ACT 200 OF 1993, § 33.

¹⁹³ *S. v. Makwanyane*, *supra* note 123, at paras. 110.

¹⁹⁴ *S. v. Makwanyane*, *supra* note 123, at paras. 110. Chaskalson P was quoting from the judgment written by Kentridge AJ in the Constitutional Court of South Africa’s case, *S. v. Zuma and Others* (CCT5/94), [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA), at para. 35.

¹⁹⁵ Chapter Three deals with “Fundamental Rights.”

example to others in the expectation that they might possibly be deterred thereby.¹⁹⁶

The CC then held as follows:

1. In terms of section 98(5) of the Constitution,¹⁹⁷ and with effect from the date of this order, the provisions of paragraphs (a), (b), (c), (d), (e) and (f) of *section 277(1)* of the Criminal Procedure Act, and all corresponding provisions of other legislation sanctioning capital punishment which are in force in any part of the national territory in terms of *section 229*, are declared to be inconsistent with the Constitution and, accordingly, to be invalid.

In terms of section 98(7) of the Constitution, and with effect from the date of this order:

(a) the State is and all its organs are forbidden to execute any person already sentenced to death under any of the provisions thus declared to be invalid; and

(b) all such persons will remain in custody under the sentences imposed on them, until such sentences have been set aside in accordance with law and substituted by lawful punishments.¹⁹⁸

E. United Republic of Tanzania

In 1990, the High Court of Tanzania at Mwanza was called upon to decide a case, *Ephrahim v. Pastory*,¹⁹⁹ which dealt with the rights of women under Haya Customary Law. In the case, a woman, Holaria Pastory, had inherited clan land from her father through a will.²⁰⁰

¹⁹⁶ S. v. Makwanyane, *supra* note 123, at paras. 144.

¹⁹⁷ This is the Interim Constitution (1993).

¹⁹⁸ S. v. Makwanyane, *supra* note 123, at paras. 151.

¹⁹⁹ *Ephrahim v. Pastory* (1990) LRC (Const.) 757; (2001) AHRLR 236 (TzHC 1990).

²⁰⁰ *Ephrahim v. Pastory*, *supra* note 199, at para. 1.

Pastory later sold the clan land to one Gervazi Kaizilege, who was considered by Pastory's clan as a stranger and non-member.²⁰¹ A day after Pastory finalized the sale of the clan land, one Bernardo Ephrahim, a relative of Pastory's, "filed a suit at Kashasha Primary Court in Muleba District, Kagera Region, praying for a declaration that the sale of the clan land by his aunt, . . . was void as females under Haya Customary Law have no power to sell clan land."²⁰²

Ephrahim's position was in line with the Haya Customary Law (Declaration) (No. 4) Order of 1963, which provides at paragraph 20 that "[w]omen can inherit, except for clan land, which they may receive in usufruct but may not sell. However, if there is no male of that clan, women may inherit such land in full ownership."²⁰³ The Primary Court agreed with Ephrahim, declared the sale null and void and asked Pastory to refund the money paid on the property to the purchaser.²⁰⁴

Pastory then appealed the Primary Court's decision to the District Court at Muleba and the latter quashed the decision of the Primary Court, stating that that ruling had been in violation of the Bill of Rights in the Constitution of the United Republic of Tanzania, which granted all citizens—men and women—equality before the law.²⁰⁵ Dissatisfied with the District Court's decision, Ephrahim appealed it to the High Court of Tanzania at Mwanza.²⁰⁶

Mwalusanya J, who wrote the decision for the High Court, began the analysis of the case by noting that Haya Customary Law is clear on the issue before the Court since it is codified "in the Laws of Inheritance of the Declaration of Customary Law, 1963" (Tanzania).²⁰⁷ Under Haya Customary Law, Mwalusanya J noted, "females can inherit clan land which they can use in usufruct . . . [b]ut they have no power

²⁰¹ Ephrahim v. Pastory, *supra* note 199, at para. 1. The sale of the clan land was finalized on August 24, 1988.

²⁰² Ephrahim v. Pastory, *supra* note 199, at para. 1.

²⁰³ Ephrahim v. Pastory, *supra* note 199, at para. 2.

²⁰⁴ Ephrahim v. Pastory, *supra* note 199, at para. 2.

²⁰⁵ See THE CONST. UNITED REP. TANZANIA, Part III (Basic Rights and Duties).

²⁰⁶ Ephrahim v. Pastory, *supra* note 199.

²⁰⁷ Ephrahim v. Pastory, *supra* note 199, at para. 2.

to sell it, otherwise the sale is null and void.”²⁰⁸ The learned judge noted, however, that there is precedent in Tanzanian case law that courts in matters such as those before the High Court, are bound by customary law.²⁰⁹

Mwalusanya J, argues, however, that since the Bill of Rights was incorporated into the constitution in 1984, “female clan members [now] have the same rights as male clan members.”²¹⁰ Unfortunately, declared the learned judge, Haya Customary Law has not been changed despite the incorporation of a Bill of Rights into the country’s constitution and subsequent guarantee of equality of women to their men-folk. He noted, specifically, that “[w]hat is more is that since the Bill of Rights was incorporated in our 1977 Constitution [vide Act no. 15 of 1984], by Article 13(4), discrimination against women has been prohibited.”²¹¹

Mwalusanya J then made note of various international human rights instruments that the United Republic of Tanzania has ratified and which outlaw discrimination, particularly against women. The learned judge states, for example, that “Tanzania has also ratified the African Charter on Human and Peoples’ Rights, 1981, which in article 18(3) prohibits discrimination on account of sex.”²¹² In addition, Mwalusanya J argues, “Tanzania has ratified the International

²⁰⁸ Ephraim v. Pastory, *supra* note 199, at para. 3.

²⁰⁹ Ephraim v. Pastory, *supra* note 199, at para. 3.

²¹⁰ Ephraim v. Pastory, *supra* note 199, at para. 5. *See also* Chris Maina Peter, *Five Years of the Bill of Rights in Tanzania: Drawing a Balance-Sheet*, 4 AFR. J. INT’L & COMP. L. 131 (1992) (examining, inter alia, the incorporation of a Bill of Rights into Tanzania’s Constitution). The Bill of Rights specifically provides that: “(1) All human beings are born free, and are all equal. (2) Every person is entitled to recognition and respect for his dignity.” CONST. UNITED REP. TANZANIA, art. 12(1–2). “All persons equal before the law and are entitled, without any discrimination, to protection and equality before law. No law enacted by any authority in the United Republic of Tanzania shall make any provision that is discriminatory either of itself or in its effect.” CONST. UNITED REP. TANZANIA, art. 13(1–2).

²¹¹ Ephraim v. Pastory, *supra* note 199, at para. 10.

²¹² Ephraim v. Pastory, *supra* note 199, at para. 10.

Covenant on Civil and Political Rights, 1966, which in article 26 prohibits discrimination based on sex.”²¹³ The judge then declares that:

The principles enunciated in the above-named documents²¹⁴ are a standard below which any civilized nation will be ashamed to fall. It is clear from what I have discussed that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories.²¹⁵

After determining that the Haya Customary Law (Declaration) (No. 4) Order of 1963 was unconstitutionally discriminatory against women, he then turned to an examination of the case at bar in order to determine the appropriate remedy. First, he made reference to § 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984 and various academic writings on § 5(1), which “hold[] the view that courts in Tanzania can modify discriminatory customary law in the course of statutory interpretation.”²¹⁶

Further, as provided by § 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984, with effect from March 1988, Tanzania’s domestic courts must construe existing law, including customary law, “[w]ith such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the provisions of the Fifth Constitutional Amendment Act, 1984, i.e., the Bill of Rights.”²¹⁷ Mwalusanya J adopted a purposive approach to constitutional interpretation and determined that in enacting § 5(1) and the Bill of Rights, it was the intention of the Parliament of the United Republic of Tanzania to “do away with all oppressive and unjust laws of the

²¹³ Ephraim v. Pastory, *supra* note 199, at para. 10.

²¹⁴ These documents are the UN’s Universal Declaration of Human Rights, 1948; Convention on the Elimination of All Forms of Discrimination Against Women, 1979; the African Charter on Human and Peoples’ Rights; and the International Covenant on Civil and Political Rights, 1966.

²¹⁵ Ephraim v. Pastory, *supra* note 199, at para. 10.

²¹⁶ Ephraim v. Pastory, *supra* note 199, at para. 22.

²¹⁷ Ephraim v. Pastory, *supra* note 199, at para. 19.

past.”²¹⁸ Parliament, Mwalusanya J noted, “wanted all existing laws (as they existed in 1984) which were inconsistent with the Bill of Rights to be inapplicable in the new era or be treated as modified so that they would be in line with the Bill of Rights. It wanted the courts to modify by construction those existing laws which were inconsistent with the Bill of Rights such that they were in line with the new era.”²¹⁹

Next, Mwalusanya J looked for guidance from the experiences of the Republic of Zimbabwe after the country introduced its Bill of Rights into its constitution.²²⁰ The Constitution of Zimbabwe, Mwalusanya J noted, also has a similar provision like Tanzania’s § 5(1) of Act 16 of 1984.²²¹ The learned justice then briefly examined a case from the Supreme Court of Zimbabwe, *Bull v. Minister of Home Affairs*, which dealt with limitations on the right to liberty guaranteed by the Bill of Rights,²²² and concluded that the case was “persuasive authority for the proposition of law that any existing law that is inconsistent with the Bill of Rights should be regarded as modified such that the offending part of that statute or law is void.”²²³

Judge Mwalusanya then held as follows:

I have found as a fact that section 20 of the Rules of Inheritance of the Declaration of Customary Law, 1963, is discriminatory of females in that, unlike their male counterparts, they are barred from selling clan land. That is inconsistent with article 13 (4) of the Bill

²¹⁸ Ephraim v. Pastory, *supra* note 199, at para. 28.

²¹⁹ Ephraim v. Pastory, *supra* note 199, at para. 28.

²²⁰ Ephraim v. Pastory, *supra* note 199, at para. 32.

²²¹ Ephraim v. Pastory, *supra* note 199, at para. 32. The relevant section in Zimbabwe’s constitution is § 4(1) of the ZIMBABWE CONSTITUTION (TRANSITIONAL, SUPPLEMENTARY AND CONSEQUENTIAL PROVISION) ORDER, 1980, which provides “That existing laws must be so construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.” See Ephraim v. Pastory, *supra* note 199, at para. 32. See also THE ZIMBABWE CONSTITUTION (TRANSITIONAL, SUPPLEMENTARY AND CONSEQUENTIAL PROVISIONS) ORDER 1980 (DONE AT THE COURT AT BUCKINGHAM PALACE, THE 19TH DAY OF MARCH 1980), § 4(1).

²²² Bull v. Minister of Home Affairs [1987] LRC (Const) 547.

²²³ Ephraim v. Pastory, *supra* note 199, at para. 34.

of Rights of our Constitution which bars discrimination on account of sex. Therefore under section 5(1) of Act 16 of 1984 I take section 20 of the Rules of Inheritance to be now *modified* and *qualified* such that males and females now have equal rights to inherit and sell clan land. Likewise the Rules Governing the Inheritance of Holdings by Female Heirs (1944) made by the Bukoba Native Authority, which in rules 4 and 8 entitle a female who inherits self-acquired land of her father to have usufructuary rights only (rights to use for her lifetime only) with no power to sell that land, is equally void and of no effect.²²⁴

Additionally, Mwalusanya J declared as follows:

From now on, females all over Tanzania can at least hold their heads high and claim to be equal to men as far as inheritances of clan land and self-acquired land of their fathers is concerned. It is part of the long road to women's liberation. But there is no cause for euphoria as there is much more to do in the other spheres. One thing which surprises me is that it has taken a simple, old rural woman to champion the cause of women in this field and not the elite women in town who chant jejune slogans for years on end on women's liberation, but without delivering the goods.²²⁵

The various African courts that we have examined were faced with important legal conflicts, which concerned the existence of laws that conflict with their countries' modernized constitutions,²²⁶ and by implication, international human rights instruments. These courts also operate in countries that have not yet internationalized their national constitutional law—while many of these countries have ratified a number of international human rights instruments, including the International Covenant on Civil and Political Rights, the International

²²⁴ Ephraim v. Pastory, *supra* note 199, at para. 42. Emphasis added.

²²⁵ Ephraim v. Pastory, *supra* note 199, at para. 44.

²²⁶ These are constitutions, which since the early-1990s, have modified to include a Bill of Rights, which guarantee fundamental rights and freedoms.

Covenant on Economic, Social and Cultural Rights, as well as, the African (Banjul) Charter on Human and Peoples' Rights, they have not yet domesticated the provisions of these international instruments. In other words, they have not yet enacted the necessary legislation to make the provisions of these instruments part of national constitutional law. As a consequence, the provisions of these international instruments do not represent rights that are justiciable in the domestic courts of many of these African countries.

Nevertheless, many of the courts that we have examined have recognized the role that they can play to bring domestic laws, including customary law, into conformity with provisions of their national constitutions, as well as, those of relevant international human rights instruments. Reliance on various international human rights instruments has allowed domestic courts in Africa, such as the High Court of Tanzania, to invalidate customary law that conflicts with the Bill of Rights. Other African courts have used the provisions of international human rights instruments as a tool to interpret national constitutions and legislative acts and bring them in conformity with international human rights law. These courts have come to the realization that the failure by their national legislatures to enact necessary legislation to domesticate international human rights instruments to which their countries are States Parties does not mean that the provisions of these instruments cannot be made relevant to the protection of human rights in these countries.

As argued by several international law experts, “[w]here States have failed to abolish or reform customary laws that discriminate against women and children and other historically marginalized groups, judges can use their interpretive powers to strike down or modify discriminatory customary law provisions and generally bring all law into conformity with the provisions of international human rights instruments.”²²⁷ In fact, as more African countries reform their institutions and provide themselves with independent judiciaries, there is likely to emerge in these countries “a progressive and global

²²⁷ John Mukum Mbaku, *International Law and Limits on the Sovereignty of African States*, 30 FLA. J. INT'L L. 43, 109 (2018).

approach to interpreting constitutional rights,”²²⁸ a development which, it is argued, “could significantly enrich national or domestic constitutional law.”²²⁹

On December 16, 1966, the UN General Assembly adopted the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and it came into effect on January 3, 1976.²³⁰ The ICESCR is a multilateral treaty, which committed States Parties to “undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the . . . Covenant.”²³¹ As of October 2019, most African countries have ratified the treaty.²³² In most of these countries, ratification, however, has not created rights that are justiciable in domestic courts. In order for each of these States Parties to the ICESCR to create rights that are justiciable in domestic courts, they must amend their national constitutions and provide a “supremacy clause,” such as that present in the U.S. Constitution.²³³ The Supremacy Clause in the U.S. Constitution reads as follows:

The Constitution, and the Laws of the United States which shall be made Pursuance thereof; and *all Treaties made*, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.²³⁴

²²⁸ Charles Manga Fombad, *Internationalization of Constitutional Law and Constitutionalism in Africa*, 60 AM. J. COMP. L. 439, 472–473 (2012).

²²⁹ Mbaku, *supra* note 227, at 109.

²³⁰ *International Covenant on Economic, Social and Cultural Rights* (ICESCR), UNGA Res. 2200A(XXI), 993 U.N.T.S. 3 (Dec. 16, 1966), <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (Oct. 17, 2019).

²³¹ ICESCR, *supra* note 230, art. 3.

²³² *International Covenant on Economic, Social and Cultural Rights: Status at 17–10–2019*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=en (Oct. 17, 2019).

²³³ CONSTITUTION OF THE UNITED STATES OF AMERICA, art. VI, clause 2.

²³⁴ CONST. UNITED STATES, art. VI, clause 2.

With such a clause, once the treaty is ratified by the country's legislature, its provisions become rights that are justiciable in domestic courts. A country can also directly insert provisions of the treaty in question into its national constitution, effectively making the rights contained in the treaty both an integral part of the constitution and of the country's laws. Beyond this, how effect is given to international instruments in a particular African country is dependent on whether the country follows the monist or dualist approach to international law.

In “[m]onist legal systems, where international law is incorporated directly into the domestic legal system,” allowance is made “for the immediate domestic application of international treaties.”²³⁵ In countries that follow the dualist approach to international law, the latter is “not automatically part of domestic law” and additional “steps are needed to incorporate it into national law.”²³⁶ Nevertheless, even in countries in which international treaties can only apply when national legislatures have either incorporated the content of the treaty into the national constitution or made reference to it in the national constitution, judges “have developed more creative ways of making use of international standards.”²³⁷ For example, before South Africa finally ratified the International Covenant on Economic, Social and Cultural Rights on January 12, 2015, its courts were already using the General Comments of the Committee on Economic, Social and Cultural Rights (“CESCR”) to “interpret the ESC rights enshrined in the South African Constitution.”²³⁸

²³⁵ International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, Human Rights and Rule of Law Series No. 2 (2008), <https://www.refworld.org/docid/4a7840562.html> (Oct. 17, 2019), at 19.

²³⁶ International Commission of Jurists, *supra* note 235, at 19.

²³⁷ International Commission of Jurists, *supra* note 235, at 19.

²³⁸ International Commission of Jurists, *supra* note 235, at 19. *See also The Government of Republic of South Africa & Others v. Irene Grootboom and Others*, [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (Oct. 4, 2000). The Committee on Economic, Social and Cultural Rights (“CESCR”) is a UN institution, consisting of eighteen experts that meets twice a year, usually in Geneva, to examine the reports sent to it by UN Member States on their compliance with the provisions of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). The CESCR also oversees the implementation of the ICESCR. *See, e.g.*, Office of the UN

In the following sections, we use case law from the Republic of South Africa to show how judges can find creative ways to use international human rights instruments to interpret the economic, social and cultural rights enshrined in their national constitutions, as well as, adjudicate cases about these rights, even if the provisions of these international human rights instruments have not yet been domesticated by their national legislatures.

II. ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN SOUTH AFRICA

A. Introduction

South African constitutional and human rights experts have noted that “[t]he constitutional protection of socio-economic rights in South Africa has to be seen in the context of the debate that has often characterized the justiciability of such rights.”²³⁹ That debate eventually came to an end, for at least two reasons. First, the Constitutional Assembly saw fit to include socio-economic rights in the Bill of Rights, making them directly justiciable in the country’s courts.²⁴⁰ Second, the Constitutional Court (“CC”), the country’s highest court, has since held that socio-economic rights are justiciable. For example, in *Government of the Republic of South Africa and Others v. Grootboom and Others*,²⁴¹ Yacoob J, writing for the Court, noted that “[w]hile the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the Certification judgment.”²⁴² The learned justice then quoted from the

High Commissioner for Human Rights, *Committee on Economic, Social and Cultural Rights*, <https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (Nov. 19, 2019).

²³⁹ John Cantius Munbanzi, *The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation*, 2 AFR. J. LEGAL STUD. 1, 3 (2006).

²⁴⁰ See CONST. REP. S. AFRICA, CHAPTER 2.

²⁴¹ *Government of the Republic of South Africa and Others v. Grootboom and Others*, [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (Oct. 4, 2000).

²⁴² *Grootboom and Others*, *supra* note 241, at para. 20.

Certification judgment.²⁴³ In response to a question regarding whether socio-economic rights are justiciable in South African courts, the Court in *In Re Certification of the Constitution of the Republic of South Africa, 1996*, held as follows:

[T]hese rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.²⁴⁴

During the post-apartheid constitution-making process, there arose questions regarding whether socio-economic rights could be enforced by the courts.²⁴⁵ In addition, it was argued further that “the protection of such rights should be a task for the legislature and executive and that constitutionalizing them would have the inevitable effect of transferring power from these two branches of government to the judiciary, which lacks the democratic legitimacy necessary to make decisions concerning allocation of social and economic resources.”²⁴⁶ However, South Africans who argued in favor of the constitutional guarantee of socio-economic rights “pointed out that it makes little sense to tell people that their civil and political rights will

²⁴³ Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC).

²⁴⁴ In Re Certification of the Constitution of the Republic of South Africa, 1996, *supra* note 243, at para. 78.

²⁴⁵ See Munbanzi, *supra* note 239, at 3. See also Christof Heyns and Danie Brand, *Introduction to socio-economic rights in the South African Constitution*, 2 LAW, DEMOCRACY & DEV. 153, 154 (JOURNAL OF THE FACULTY OF LAW, UWESTERN CAPE, SOUTH AFRICA) (1998).

²⁴⁶ See Munbanzi, *supra* note 239, at 3.

be protected, if they continue to be at the mercy of the elements and of social exploitation.”²⁴⁷

Some constitutional scholars have argued that “[s]ocio-economic rights are a central terrain in new democracies,”²⁴⁸ such as South Africa’s, and that while they are “[o]ften deemed essential for the legitimacy of the constitution at the time of adoption, they are subject to downstream pressures at the implementation stage as governments confront limited budgets and the need for macroeconomic credibility.”²⁴⁹ Including socio-economic rights in the Bill of Rights, it was argued by some South Africans, would raise “the [specter] of angry and disillusioned people holding up the Constitution and asking whether this is what the struggle [against apartheid] was all about.”²⁵⁰

Then, there was the argument that proper adjudication of socio-economic rights “requires an assessment of fundamental social values that can only be carried out legitimately by the political branches of government, and [that] the proper enforcement of socio-economic rights requires significant government resources that can only be adequately assessed and balanced by the legislature.”²⁵¹ It was also argued that “[j]udges and courts . . . lack the political legitimacy and institutional competence to decide such matters.”²⁵²

In the end, socio-economic rights were entrenched in South Africa’s permanent post-apartheid constitution—Constitution of the

²⁴⁷ Heyns and Brand, *supra* note 245, at 154.

²⁴⁸ Rosalind Dixon and Tom Ginsburg, *The South African Constitutional Court and Socio-Economic Rights as ‘Insurance Snaps,’* Coase-Sandor Institute for Law and Economics Working Paper No. 650 (2d Series)/Public Law and Legal Theory Working Paper No. 436, University of Chicago Law School, Aug. 2013, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1426&context=public_law_and_legal_theory (Dec. 10, 2019), at 1.

²⁴⁹ Dixon and Ginsburg, *supra* note 248, at 1.

²⁵⁰ Heyns and Brand, *supra* note 245, at 154.

²⁵¹ Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitution*, 38 COLUM. HUM. RTS. L. REV. 321, 322 (2007).

²⁵² Christiansen, *supra* note 251, at 322.

Republic of South Africa, 1996.²⁵³ The debate then moved on to what role judges would play in the implementation and enforcement of these rights. The International Commission of Jurists has noted that

[i]n cases where different legal interpretations are possible, if duties or prohibitions regarding [economic, social and cultural] rights are part of the legal system, and especially of the superior layers of the legal system, assigning judges a role in the enforcement of these norms is absolutely compatible with the traditional functions performed by the judiciary.²⁵⁴

Of course, constitutionally guaranteeing socio-economic rights imposes a duty on the government of South Africa to find ways to realize these rights. Given the universal problem of scarcity, it is most likely the case that, in enacting legislation to realize the rights guaranteed by the constitution, which include socio-economic rights, there is bound to arise issues of “equity,” “reasonableness,” “proportionality,” etc., all of which are within the purview of the judiciary.²⁵⁵

As South Africans engaged in national discourse about the *constitutional principles* that were expected to form the foundation for their permanent post-apartheid constitution and serve as a constraint on the constitutional drafters (i.e., the Constitutional Assembly), constitutional and legal scholars floated four options, which they believed, could help resolve the various issues associated with the guarantee of socio-economic rights. These included:

- (1) the full recognition of socio-economic rights as justiciable rights without any qualifications;

²⁵³ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT NO. 108 OF 1996 (adopted on May 8, 1996 and amended on Oct. 11, 1996 by the Constitutional Assembly). Socio-economic rights are found in the Bill of Rights (Chapter 2).

²⁵⁴ International Commission of Jurists, *supra* note 235, at 77.

²⁵⁵ International Commission of Jurists, *supra* note 235, at 77.

- (2) including socio-economic rights in the Bill of Rights as justiciable rights;
- (3) merely listing them as non-justiciable principles of state policy; or
- (4) not making any reference to these rights at all.²⁵⁶

South Africa's first post-apartheid constitution, the Interim or Transitional Constitution, was designed to enhance and facilitate governance while the Constitutional Assembly drafted the permanent constitution.²⁵⁷ During South Africa's multi-party constitutional negotiation process, which took place between 1990 and 1993, "the ANC ("African National Congress")²⁵⁸ and like-minded parties wished a democratically elected constituent assembly to have an almost free hand in drafting the Bill of Rights, and therefore argued for as minimal a protection of rights in the interim constitution as possible."²⁵⁹ The ANC and its supporters were of the view that the multi-party constitutional negotiations were expected to produce an interim constitution that would facilitate and enhance transition to democratic rule and that a democratically elected Constituent or Constitutional Assembly, empowered by the people, would draft the Bill of Rights. As a consequence, the ANC "required protection for the most basic civil and political rights, those essential to a process of 'free and fair elections'" and which would be found in most of the world's democratic constitutions.²⁶⁰ The democratically elected Constituent

²⁵⁶ Heyns and Brand, *supra* note 245, at 154.

²⁵⁷ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 200 OF 1993 (INTERIM CONSTITUTION) (REPEALED BY THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (ACT NO. 108 OF 1996), G 17678, Dec. 18, 1996.

²⁵⁸ The African National Congress was one of several political parties involved in the constitutional negotiations to end apartheid and bring about a non-racial democratic system in South Africa. *See, e.g.*, ANDREA LOLLINI, CONSTITUTIONALISM AND TRANSITION: JUSTICE IN SOUTH AFRICA 49 (2011) (examining, inter alia, the constitutional negotiations that established the Constitution of the Republic of South Africa, 1996 and the post-apartheid democratic South African State).

²⁵⁹ Hugh Corder, *Towards a South African Constitution*, 57 MOD. L. REV. 491, 512 (1994).

²⁶⁰ Corder, *supra* note 259, at 512.

Assembly, which was empowered to draft the country's permanent post-apartheid constitution, would then be left to decide how to protect socio-economic rights.

Thus, the Interim Constitution dealt primarily with what were considered largely uncontroversial rights—political and civil rights. Hence, while there was an exhaustive list of political and civil rights, the list of economic, social and cultural rights was relatively limited. Section 27 (labor rights) enshrined various labor rights, including, for example, the right of labor “to strike for the purpose of collective bargaining;”²⁶¹ section 25 guaranteed the right of “[d]etained, arrested and accused persons to be detained under conditions consonant with human dignity, which shall include at least the provision of adequate nutrition, reading material and medical treatment at state expense”;²⁶² section 30 guaranteed children the right “to security, basic nutrition and basic health and social services”;²⁶³ and section 32 guaranteed that “[e]very person shall have the right to basic education and to equal access to educational institutions.”²⁶⁴

The decision regarding the inclusion of socio-economic rights in the final and permanent constitution was left to be decided by the Constitutional Assembly (“CA”), the drafters of that constitution. By entrenching socio-economic rights in the Bill of Rights (Chapter 2 of the Constitution), the CA effectively recognized them as human rights, on the same level as civil and political rights.²⁶⁵ Nevertheless, the CA decided that “extensive internal limitations would apply in respect of most aspects of these rights, to restrict the obligations placed on the [South African] state.”²⁶⁶ Since these were rights guaranteed by the constitution, they were directly justiciable in the country's courts.

²⁶¹ INTERIM CONST. S. AFR., *supra* note 257, § 27(4).

²⁶² INTERIM CONST. S. AFR., *supra* note 257, § 25(1)(b).

²⁶³ INTERIM CONST. S. AFR., *supra* note 257, § 30(1)(c).

²⁶⁴ INTERIM CONST. S. AFR., *supra* note 257, § 32(a).

²⁶⁵ CONST. REP. S. AFRICA, 1996, Chapter 2. *See also* Jonathan Klaaren, *A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights*, 27 HUM. RTS. Q. 539, 543 (2005).

²⁶⁶ Heyns and Brand, *supra* note 245, at 155.

Two institutions were granted the power to enforce these rights—the courts and the South African Human Rights Commission (“SAHRC”).²⁶⁷ Since the socio-economic rights guaranteed by the constitution were justiciable in the nation’s courts, a citizen-litigant could directly and indirectly invoke them. Nevertheless, it has been argued that the SAHRC’s “decisions are not legally binding,” meaning that the protection of these rights by the SAHRC is only “soft protection.”²⁶⁸ In addition, the role played by South Africa’s courts and the South African Human Rights Commission must be seen in “the context of and in interaction with the role of those institutions with an implicit, but vital function in the process of implementing socio-economic rights, such as the legislature, elected by popular franchise.”²⁶⁹

Post-apartheid South Africa’s situation, particularly with respect to the constitutional protection of socio-economic rights, is considered exemplary. First, it is one of the few countries whose constitution has recognized socio-economic rights as human rights and entrenched them in the country’s Bill of Rights. Second, “[a]lthough some other countries’ constitutions enumerate socio-economic rights, few countries’ courts have found such rights to be fully and directly justiciable, and even fewer have multiple, affirmative social rights opinions. No other country has developed their case law sufficiently to outline a comprehensive jurisprudence.”²⁷⁰

²⁶⁷ The South African Human Rights Commission is a constitutionally-created and mandated institution, tasked with promoting respect for human rights and a culture of human rights in South Africa. Its functions are provided in §§ 184–186 of the CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA NO. 108 OF 1996. It is one of several institutions that were established in terms of Chapter 9 of the Constitution of the Republic of South Africa and empowered to guard the country’s democracy. The others are (1) The Public Protector; (2) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; (3) The Commission for Gender Equality; (4) The Auditor-General; and (5) The Independent Electoral Commission. *See* CONST. REP. S. AFRICA, 1996, Chapter 9.

²⁶⁸ Heyns and Brand, *supra* note 245, at 155–156.

²⁶⁹ Heyns and Brand, *supra* note 245, at 156.

²⁷⁰ Christiansen, *supra* note 251, at 323.

Proponents of the justiciability of socio-economic rights consider South Africa's role as "revolutionary and heroic" while "detractors" see South Africa's role as "irresponsible and doomed."²⁷¹ Some scholars have suggested that guidance could be obtained from examining case law from various jurisdictions around the world, while others have argued in favor of seeking guidance from "the jurisprudence which has been developed on the level of international law."²⁷² In fact, they argue that "legal protection for socio-economic rights, . . . , largely has its roots in international law."²⁷³ However, an examination of South African court adjudications of cases involving socio-economic rights reveals "a [Constitutional] Court that has been both less revolutionary and less irresponsible than commentators expected (and continue to allege)."²⁷⁴ Christiansen goes on to argue that

[t]his is because the Court's jurisprudence has incorporated the concerns of the jurists who argue that courts lack the legitimacy and competence to decide such matters, even while the Court is performing the affirmative review and remediation functions desired by the jurists who favor enforcement of social rights. The Court maintains an affirmative social rights jurisprudence tempered by internalized justiciable concerns.²⁷⁵

The International Covenant on Economic, Social and Cultural Rights ("ICESCR") is the primary UN human rights instrument that deals with socio-economic rights.²⁷⁶ South Africa signed the ICESR on

²⁷¹ Christiansen, *supra* note 251, at 323.

²⁷² Heyns and Brand, *supra* note 245, at 156.

²⁷³ Heyns and Brand, *supra* note 245, at 156.

²⁷⁴ Christiansen, *supra* note 251, at 323.

²⁷⁵ Christiansen, *supra* note 251, at 323–324.

²⁷⁶ See, e.g., PROGRAM ON WOMEN'S ECONOMIC, SOCIAL AND CULTURAL RIGHTS (NEW DELHI), HUMAN RIGHTS FOR ALL: INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (New Delhi, India, 2015), http://www.pwescr.org/PWESCR_Handbook_on_ESCR.pdf (Dec. 11, 2019). See also INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 993 U.N.T.S. 3 (Dec. 16, 1966).

October 3, 1994, and ratified it on January 12, 2015.²⁷⁷ There are, of course, other international human rights instruments with provisions that guarantee the protection of socio-economic rights. For example, articles 22–26 of the Universal Declaration of Human Rights guarantees various socio-economic rights, including, for example, the “right to social security,” “the right to work,” “the right to equal pay for equal work,” “the right to rest and leisure,” “the right to a standard of living adequate for the health and well-being of himself and of his family,” the right of children, regardless of the nature of their birth, to enjoy all the protections granted to others, and “the right to education.”²⁷⁸

The Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) also has provisions that guarantee socio-economic rights, specifically for women. For example, article 3 states as follows:

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.²⁷⁹

The Republic of South Africa signed the CEDAW on January 29, 1993, and ratified it on December 15, 1995.²⁸⁰ South Africa is also

²⁷⁷ INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: STATUS AS AT OCTOBER 19, 2019 (STATUS OF TREATIES), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en (Oct. 19, 2019).

²⁷⁸ UNIVERSAL DECLARATION OF HUMAN RIGHTS, UNGA Res. 217A(III) (Dec. 10, 1948).

²⁷⁹ CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, 1249 U.N.T.S. 13 (Dec. 18, 1979), art. 3. *See also* arts. 10–14.

²⁸⁰ CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: STATUS AS OF OCTOBER 19, 2019 (STATUS OF TREATIES),

a State Party to the UN Convention on the Rights of the Child,²⁸¹ which also has provisions that protect socio-economic rights. South Africa signed the African (Banjul) Charter on Human and Peoples' Rights on July 9, 1996, and ratified it on the same day.²⁸² The Banjul Charter has provisions that guarantee both civil and political, as well as social and economic rights.²⁸³

The UN Committee on Economic, Social and Cultural Rights ("CESCR")²⁸⁴ is the international institution empowered and charged with supervising compliance by States Parties to the ICESCR. States Parties are supposed to send regular reports to the CESCR on how they are realizing the rights guaranteed by the ICESCR. Although these reports are supposed to be submitted by the governments of the States

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtldsg_no=IV-8&chapter=4&clang=_en (October 19, 2019).

²⁸¹ CONVENTION ON THE RIGHTS OF THE CHILD, 1577 U.N.T.S. 3 (Nov. 20, 1989). *See generally* arts. 4, 6(2), 19, 20, 24, 26–29, and 31.

²⁸² OAU/AU TREATIES, CONVENTIONS, PROTOCOLS & CHARTERS, <https://au.int/en/treaties> (Oct. 19, 2019).

²⁸³ The Banjul Charter recognizes the right to work (Article 15), the right to health (Article 16), and the right to education (Article 17). Through its decision in *SERAC v. Nigeria*, the African Commission on Human and Peoples' Rights interpreted the Banjul Charter to include a right to housing and a right to food, the right to health, and the right to development. *See* African Commission on Human and Peoples' Rights, Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria (Communication No. 155/96), <https://www.escr-net.org/caselaw/2006/social-and-economic-rights-action-center-center-economic-and-social-rights-v-nigeria> (Dec. 11, 2019).

²⁸⁴ The Committee on Economic, Social and Cultural Rights is "a body of 18 independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States [P]arties." *See* Office of the UN Commissioner for Human Rights, *Committee on Economic, Social and Cultural Rights*, <https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (Oct. 19, 2019). The Committee was established under ECOSOC Res. 1985/17 (May 28, 1985) and charged with carrying out the monitoring of the functions assigned to the United National Economic and Social Council ("ECOSOC") in Part IV of the International Covenant on Economic, Social and Cultural Rights. Part IV covers arts. 16–25. According to art. 16, "[t]he States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein." INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 993 U.N.T.S. 3 (Dec. 18, 1966), art. 16.

Parties, in practice, non-governmental organizations (“NGOs”) working on development and human rights issues also submit what are referred to as “shadow reports” which are considered an integral part of the CESCR reporting system and an important input into the CESCR’s country review process.²⁸⁵

Since it came into being in 1985, the CESCR has issued several General Comments on the ICESCR, “which have developed the normative content of [economic, social and cultural] rights and State obligations since the 1990s.”²⁸⁶ For example, the CESCR issued its first general comment on July 27, 1981, titled *CESCR General Comment No. 1: Reporting by States Parties*.²⁸⁷ This comment explains the reporting system and elaborates on the system’s seven objectives. The initial report, which each State Party was required to submit within “two years of the Covenant’s entry into force for the State Party concerned,” was to ensure that “a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant.”²⁸⁸

²⁸⁵ See, e.g., International Women’s Rights Action Watch, *NGO Shadow Reporting to CESCR: A Procedural Guide* (June 2003), <http://hrlibrary.umn.edu/iwraw/shadow/CESCRNGOguideJune2003.pdf> (Dec. 11, 2019); See also Rukmini Datta & Program on Women’s Economic, Social and Cultural Rights, *New Perspectives on NGO Reporting to the UN Committee on Economic, Social and Cultural Rights: Challenges and Opportunities*, http://www.pwescr.org/PWESCRPaperPR-Revised_8-9-2012%5B1%5D.pdf (Dec. 11, 2019) & International Commission of Jurists, *Overview of the Periodic Reporting Process of the UN Human Rights Treaty Bodies, International Commission of Jurists Background Note*, <https://www.icj.org/wp-content/uploads/2014/02/TreatyBodies-PeriodicReporting.pdf> (Dec. 11, 2019).

²⁸⁶ Manisuli Ssenyonjo, *The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa*, 64 NETH. INT’L L. REV. 259, 263 (2017).

²⁸⁷ Office of the High Commissioner for Human Rights, *CESCR General Comment No. 1: Reporting by States Parties*, Adopted at the Thirteenth Session of the Committee on Economic, Social and Cultural Rights, July 27, 1981, UN Doc. E/1989/22 (July 27, 1981), <https://www.refworld.org/docid/4538838b2.html> (Oct. 19, 2019).

²⁸⁸ CESCR General Comment No. 1, *supra* note 287, para. 1.

B. The South African Constitution and Economic, Social and Cultural Rights

The rights guaranteed by the International Covenant on Economic, Social and Cultural Rights (“ESC rights”) can only be realized on the territory of the States Parties to the Covenant. As of October 2019, one hundred seventy (170) countries have ratified the ICESCR and hence, are States Parties to the Covenant.²⁸⁹ Each State Party is under obligation to “take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including the adoption of legislative measures.”²⁹⁰

The first step that States Parties should take in order help them effectively realize ESC rights is for each of them to incorporate these rights into their national constitutions and make them part of their constitutional law. By doing so, States Parties make the incorporated ESC rights directly justiciable in their domestic courts and grant aggrieved citizens the standing to make a claim before the courts for a remedy.²⁹¹ The process of domesticating ESC rights can involve explicitly listing all these rights in the constitution (e.g., in the Bill of Rights) or by inserting in the national constitution, a phrase that makes the treaty (i.e., the ICESCR) part of the State Party’s constitutional law. For example, according to Article 2(6) of the Constitution of Kenya, “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”²⁹² Since Kenya ratified the ICESCR on May 1, 1972, and taking into consideration Article 2(6) of the

²⁸⁹ INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: STATUS AS AT OCTOBER 20, 2019 (STATUS OF TREATIES), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en (Oct. 20, 2019).

²⁹⁰ INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 993 U.N.T.S. 3 (Dec. 16, 1966), art. 2(1).

²⁹¹ See Evan Rosevear, Ran Hirschl & Courtney Jung, *Justiciable and Aspirational Economic and Social Rights in National Constitutions*, in *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS* 37 (Katharine G. Young ed., 2019) (examining, inter alia, the justiciability of economic and social rights in domestic courts).

²⁹² CONSTITUTION OF KENYA, 2010, art. 2(6).

Constitution, the ESC rights are, in principle, part of the laws of Kenya and hence, are justiciable in Kenyan courts.²⁹³

South Africa is one of the few African countries that have directly incorporated all or some of the ESC rights into their national constitutions. The constitution that South Africans ratified and adopted in 1996 was part of a national effort to deal with the injustices of their racialized past and provide a foundation for the construction of a non-racial democratic governance system. For example, the Preamble to the Constitution begins with the following words:

We, the people of South Africa,

Recognize the injustices of our past;

Honor those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.²⁹⁴

Those injustices of the past included the denial of economic, social and cultural rights to the country's majority African groups. It is no wonder that the architects of the country's post-apartheid

²⁹³ In ratifying the ICESCR, Kenya made some declarations and reservations. Upon ratification, Kenya made the following statement: "While the Kenya Government recognizes and endorses the principles laid down in paragraph 2 of article 10 of the Covenant, the present circumstances obtaining in Kenya do not render necessary or expedient the imposition of those principles by legislation." *See* INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: STATUS AS AT OCTOBER 20, 2019 (STATUS OF TREATIES), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en (Oct. 20, 2019), at "Declarations and Reservations." Paragraph 2 of Article 10 states as follows: "Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits." *Id.* at art. 10(2).

²⁹⁴ CONST. REP. S. AFR., 1996, pmbl.

constitution took a special interest in entrenching ESC rights in the country's permanent constitution. However, it is important to note that South Africans did not list ESC rights separately from other fundamental rights. Instead, they considered ESC rights, together with civil and political rights "as human rights in the Bill of Rights" and hence, ESC rights "are interspersed between the other rights, on an equal level, emphasizing the interdependence and indivisibility of the different generations of rights."²⁹⁵ Chapter 2 of the Constitution is devoted to the Bill of Rights, which the drafters considered as the "cornerstone of democracy" in the country and which "enshrines the rights of all the people in [the] country and affirms the democratic values of human dignity, equality and freedom."²⁹⁶ The Constitution imposed an obligation on the State of South Africa to "respect, protect, promote and fulfil the rights in the Bill of Rights."²⁹⁷ This duty implies that the State must not only make certain that these rights are not violated by non-state actors but that the State itself and its agents (i.e., state actors), must not violate the rights guaranteed in the Bill of Rights.

Heyns and Brand have noted that a violation of the State's duty to *respect* can involve a situation in which the State, for example, "without proper justification or procedure, demolishes the shacks of squatters, thereby removing their existing access to housing."²⁹⁸ They go on to argue that the "duty to *protect* places a positive duty on the state to protect the bearers of these rights from unwarranted interference by private or non-state parties, or at least to provide an

²⁹⁵ Heyns and Brand, *supra* note 245, at 157.

²⁹⁶ CONST. S. AFR., 1996, § 7(1).

²⁹⁷ CONST. S. AFR., 1996, § 7(2).

²⁹⁸ Heyns and Brand, *supra* note 245 at 158. Feinberg argues, for example, that after 1948, the year in which apartheid became official policy in South Africa, the "government orchestrated a new, large-scale dispossession to evict African owners and tenants from their urban homes and districts, as well as to expel rural Africans from so-called 'black spots.' This policy of forced removals may have included as many as 3.5 million people and included a reorganization of rural space to accommodate the people who were removed from cities or their rural land." See Harvey M. Feinberg, *Dispossession, Black South African Land Ownership and Restitution in Historical Perspective, 1913–1948 and Beyond*, in SOUTH AFRICA AFTER APARTHEID: POLICIES AND CHALLENGES OF THE DEMOCRATIC TRANSITION 87, 87 (Arrigo Pallotti & Ulf Engel eds., 2016).

effective remedy should that have happened.”²⁹⁹ They note that, with respect to South Africa, the right to protect, when “[a]ppplied to the right to access to sufficient food for instance, this duty implies that the state is under an obligation to regulate the prices of foodstuffs, in order to ensure that they remain within the reach of ordinary people.”³⁰⁰

With respect to the right to promote, the State has the obligation to educate the citizenry and make sure that they are fully aware of their rights while “[t]he obligation to *fulfil* refers to the positive obligation on the state to ensure the full realization of the rights in question.”³⁰¹ When the duty to fulfil is applied to ESC rights, it means that “except to the extent that this is excluded through internal qualifiers (and of course the general limitations clause), the state must ensure that everyone within its jurisdiction ultimately receives the social goods in question.”³⁰²

Section 8(2) is another general provision of the Constitution of the Republic of South Africa, which can potentially and significantly impact human rights in South Africa generally and socio-economic rights in particular. This section states as follows: “A provision of the

²⁹⁹ Heyns and Brand, *supra* note 245, at 158. Emphasis in original.

³⁰⁰ Heyns and Brand, *supra* note 245, at 158.

³⁰¹ Heyns and Brand, *supra* note 245, at 158. Emphasis in original.

³⁰² Heyns and Brand, *supra* note 245, at 158. *See also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, The Netherlands, Jan. 22–26, 1997, para. 6, http://hrlibrary.umn.edu/instate/Maastrichtguidelines_.html (Oct. 20, 2019). Paragraph 6 of the Maastricht Guidelines, which deals with the obligations to respect, protect and fulfil states as follows: “Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labor standards may amount to a violation of the right to work or the right to just and favorable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.” Maastricht Guidelines, *id.* at para. 6.

Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”³⁰³

According to § 8(2), ESC rights bind the State and create and regulate a vertical relationship between it and individuals within the State.³⁰⁴ The section also creates and regulates a horizontal relationship between private parties. It is important too that §§ 26(3) and 27(3) which deal with *arbitrary evictions* and the *denial of emergency medical treatment* respectively, clearly bind private persons/parties.³⁰⁵ The ESC rights and all the other rights in the Bill of Rights are subject to the general limitation clause provided in § 36.³⁰⁶

In ratifying the ICESCR, some countries made “qualifications” in respect of some of the rights guaranteed by the Covenant. South Africa ratified the Covenant on January 12, 2015, and in doing so, it made a declaration under Article 13(2)(a), which read as follows: “The Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13(2)(a) and Article 14, within the framework of its National Education Policy and

³⁰³ CONST. S. AFR., 1996, § 8(2).

³⁰⁴ If, for example, the state arbitrarily deprives a person of his property, that person can seek relief in the courts. Such action by the state violates § 25(1) of the Constitution (which is part of the Bill of Rights). That section states as follows: “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.” CONST. S. AFR., 1996, § 25(1).

³⁰⁵ If a landlord arbitrarily evicts a tenant, the latter can bring action in court for relief. The landlord’s action violates one of the rights elaborated in the Bill of Rights. Section 26(3) states as follows: “No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.” CONST. S. AFR., 1996, § 26(3). *See also* Heyns and Brand, *supra* note 245, at 158.

³⁰⁶ Section 36(1) states that: “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.” CONST. S. AFR., 1996, § 36(1).

available resources.”³⁰⁷ In South Africa, civil society and various non-governmental organizations (e.g., the Socio-Economic Rights Institute,³⁰⁸ the Legal Resources Center, Section 27,³⁰⁹ and the Community Law Center),³¹⁰ many of whom had fought for ratification, criticized the government regarding its Article 13(2)(a) declaration. Section 27, the Legal Resources Center and several other NGOs declared as follows: “We are dismayed by the qualification made in respect of the right to education, which detracts from what is otherwise a moment to celebrate.”³¹¹

The South African Constitution provides qualifications to ESC rights that are similar to those attached to the rights in the ICESCR. For example, § 27 of the South African Constitution guarantees rights to health care, food, water and social security. Nevertheless, paragraph 2 of § 27 imposes an internal qualification on the State’s obligation to realize these rights: “The state must take *reasonable legislative and other measures, within its available resources*, to achieve the *progressive realization* of

³⁰⁷ INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: STATUS AS AT OCTOBER 21, 2019: DECLARATIONS AND RESERVATIONS, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en#EndDec (Oct. 21, 2019).

³⁰⁸ The Socio-Economic Rights Institute of South Africa is a non-profit human rights organization, “which work[s] with communities, social movements, individuals and other non-profit organizations in South Africa and beyond to develop and implement strategies to challenge inequality and realize socio-economic rights.” SERI (SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA), <http://www.seri-sa.org> (Oct. 21, 2019).

³⁰⁹ According to its website, Section 27 is “a public interest law center that seeks to achieve substantive equality and social justice in South Africa.” See SECTION 27: CATALYSTS FOR JUSTICE, <http://section27.org.za> (Oct. 21, 2019).

³¹⁰ The Community Law Center was renamed the Dullah Omar Institute for Constitutional Law, Governance and Human Rights in honor of its founding direction, Dullah Omar, the first Minister of Justice in post-apartheid democratic South Africa. The Center was born out of community reaction to apartheid and opened its doors in 1990 with financial assistance from the Ford Foundation. The Center played a critical role in the negotiations to produce a non-racial democratic state in South Africa. See *Dullah Omar Institute: About Us*, <https://dullahomarinate.org.za/about-us/about-the-institute> (Oct. 21, 2019).

³¹¹ ESCR-Net, *The Government of South Africa ratifies the ICESCR*, Jan. 201, 2015, <https://www.escri-net.org/news/2015/government-south-africa-ratifies-icescr> (Oct. 21, 2019).

each of these rights.”³¹² It is evident, then, that with respect to South Africa, one can recognize two types of ESC rights: “those with a fairly standard list of internal qualifications, and those without these qualifications.”³¹³ The standard qualifications indicate that the government need only provide “access” to the “social good in question”³¹⁴ and can do so, as made evident by § 27, “subject to available resources” and the State need only take “reasonable legislative and other measures” towards the “progressive realization” of these ESC rights.³¹⁵

The South African constitution speaks in terms of “rights to access,” as opposed to “direct access” to certain social goods. For example, § 26(1) states that “[e]veryone has *the right to have access* to adequate housing” and that “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.”³¹⁶ Again, in § 27(1), it is stated that “[e]veryone has *the right to have access* to—(a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.”³¹⁷ Heyns and Brand argue that:

The formulation of some socio-economic rights in the South African Constitution as rights to “access” to certain social goods, rather than as direct rights to the social goods in question, does not reflect the formulation of socio-economic rights in the ICESCR or other international instruments, where rights are formulated as direct rights.³¹⁸

³¹² CONST. S. AFR., 1996, § 27(2). Emphasis added.

³¹³ Heyns and Brand, *supra* note 245, at 158.

³¹⁴ Heyns and Brand, *supra* note 245, at 159.

³¹⁵ CONST. S. AFR., 1996, § 27(2). *See also* Heyns and Brand, *supra* note 245, at 159.

³¹⁶ CONST. S. AFR., 1996, § 26(1). Emphasis added.

³¹⁷ CONST. S. AFR., 1996, § 27(1)(a–c).

³¹⁸ Heyns and Brand, *supra* note 245, at 159.

They go on to note that this formulation, “give[s] expression to the interpretation attached to the rights on the international level as in the first instance rights to the creation of an enabling environment rather than rights to the provision of specific social goods.”³¹⁹ Thus, “[t]he point of departure on the international level with regard to socio-economic rights is that of individuals who, given the right kind of enabling environment, are able to acquire the social goods implied by these rights for themselves.”³²⁰ The obligation imposed on the State with respect to these rights as defined in these international instruments is that each State should “create the right kind of environment within which self-sufficient individuals are able to acquire social goods for themselves” and that the State does not have to directly provide these socio-economic goods.³²¹

With respect to South Africa, consider, for example, the right to *health care, food, water, and society security*, enumerated in § 27 of the South African Constitution.³²² The enumeration of these rights is prefaced by the phrase: “Everyone has *the right to have access to*,”³²³ which implies that the obligation imposed on the State of South Africa by the constitution is not for the government to directly provide those social goods and services (e.g., health care, food, water, and social security). Instead, the constitutional obligation is for the government to create an enabling environment within which each citizen can, on their own accord, acquire the socio-economic goods implied by these rights.³²⁴

The South African Constitution states simply that “[e]veryone has the right to have access to,” for example, “adequate housing,” “health care services, including reproductive health care,” etc.³²⁵ It appears that under Section 27(1)(b) of the South African Constitution, which deals with the *right to have access to* “sufficient food and water,”³²⁶ the South African state—at the national, provincial and local levels—

³¹⁹ Heyns and Brand, *supra* note 245, at 159.

³²⁰ Heyns and Brand, *supra* note 245, at 159.

³²¹ Heyns and Brand, *supra* note 245, at 159.

³²² CONST. S. AFR., 1996, § 27(1).

³²³ CONST. S. AFR., 1996, § 27(1). Emphasis added.

³²⁴ Heyns and Brand, *supra* note 245, at 159.

³²⁵ CONST. S. AFR., 1996, §§ 26(1) and 27(1)(a).

³²⁶ CONST. S. AFR., 1996, § 27(1)(b).

is not legally required to provide citizens with food. However, the State is required to make certain that quality food at affordable prices is made available to all citizens. Nevondwe and Odeku argue, for example, that “the right to food is subject to the qualifier of progressive realization within the State’s available resources.”³²⁷

Thus, the ESC rights guaranteed by South Africa’s Bill of Rights do not entitle citizens to socio-economic goods that are provided by the government at no cost to them. As made clear by § 27, the Constitution only guarantees the “*right to have access to*,” for example, “sufficient food and water.”³²⁸ Nevertheless, in the case of a “natural disaster or famine, or other forms of destitution,” the State is then expected to “become responsible for the actual provision of food” and other socio-economic goods and services (e.g., health care).³²⁹

The UN CESCR has made several *general comments* on the nature of States Parties’ obligations with regard to the ESC rights. In General Comment No. 3, the CESCR states that “while the [ICESCR] provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.”³³⁰ According to the CESCR, in order to fully understand and appreciate the “precise nature” of the obligations of States Parties under the ICESCR,³³¹ one must take cognizance of the following specific obligations found in Articles 2(1) & 2(2): First, is the “undertakes to take steps” obligation:

Each State Party to the present Covenant *undertakes to take steps*, individually and through international

³²⁷ Lufuno Nevondwe and Kola O. Odeku, *An Overview of the Constitutional Right to Food under the South African Constitution*, 5 MEDITERRANEAN J. SOC. SCI. 761, 761–762 (2014).

³²⁸ CONST. REP. S. AFR., 1996, § 27(1)(b).

³²⁹ Heyns and Brand, *supra* note 245, at 159.

³³⁰ Office of the High Commissioner for Human Rights, *CESCR General Comment No. 3: The Nature of States’ Obligations (Art. 2, Para. 1, of the Covenant)*, E/1991/23, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?TreatyID=9&DocTypeID=11 (Oct. 31, 2019).

³³¹ CESCR General Comment No. 3, *supra* note 330, para. 1.

assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.³³²

Second, is the “undertake to guarantee” that the rights enumerated in the ICESCR “will be exercised without discrimination” obligation:

The States Parties to the present Covenant *undertake to guarantee* that the rights enunciated in the present Covenant *will be exercised without discrimination* of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³³³

With respect to these two obligations, the CESCR, in its General Comment No. 3, states that “while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the [ICESCR’s] entry into force for the States concerned” and that “[s]uch steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the [ICESCR].”³³⁴ Although, as indicated in Article 2(1), each State Party is required to undertake to take steps to achieve the full realization of the rights recognized in the ICESCR, the State Party is expected to do so “to the maximum of its *available resources*.”³³⁵ CESCR adds in its General Comment No. 3, however, that “even where the available resources are demonstrably inadequate, the obligation remains for a State Party to strive to ensure the widest possible enjoyment of the relevant rights under the

³³² See ICESCR, *infra* note 333, art. 2(1). Emphasis added.

³³³ *International Covenant on Economic, Social and Cultural Rights* (ICESCR), UNGA Res. 2200A (XXI) (Dec. 16, 1966), <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (Oct. 31, 2019), art. 2(2). Emphasis added.

³³⁴ See CESCR General Comment No. 3, *supra* note 330, para. 2.

³³⁵ See ICESCR, *supra* note 333, art. 2(1). Emphasis added.

prevailing circumstances.”³³⁶ Thus, even if a State does not have enough resources to carry out all its necessary obligations, “the obligation remains for a State Party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.”³³⁷ In addition, argues the CESCR, “even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programs.”³³⁸

The means which the State is expected to use to realize the qualified ESC rights contained in South Africa’s Bill of Rights—which are “reasonable legislative and other measures,”³³⁹ are “similar to those mentioned in article 2(1) of the ICESCR (‘all appropriate means, including particularly the adoption of legislative measures’).”³⁴⁰ The CESCR argues, however, that “the adoption of legislative measures, as specifically foreseen by the [ICESCR], is by no means exhaustive of the obligations of States Parties.”³⁴¹ The phrase “by all appropriate means,” argues the CESCR, “must be given its full and natural meaning.”³⁴² States Parties to the ICESCR must, therefore, provide the CESCR with reports that “indicate not only the measures that have been taken but also the basis on which they are considered to be the most ‘appropriate’ under the circumstances.”³⁴³

The CESCR also noted that “[a]mong the measures that might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable.”³⁴⁴ For example, in South Africa, a country with a notorious and painful history of racial and other forms of discrimination, the provision of an

³³⁶ CESCR General Comment No. 3, *supra* note 330, para. 11.

³³⁷ CESCR General Comment No. 3, *supra* note 330, para. 11.

³³⁸ CESCR General Comment No. 3, *supra* note 330, para. 12.

³³⁹ CONST. S. AFR., 1996, § 24(b).

³⁴⁰ Heyns and Brand, *supra* note 245, at 160. *See also* ICESCR, *supra* note 333, art. 2(1).

³⁴¹ CESCR General Comment No. 3, *supra* note 330, para. 4.

³⁴² CESCR General Comment No. 3, *supra* note 330, para. 4.

³⁴³ CESCR General Comment No. 3, *supra* note 330, para. 4.

³⁴⁴ CESCR General Comment No. 3, *supra* note 330, para. 5.

effective and independent judiciary system has been considered critical to the elimination of various forms of discrimination in the post-apartheid society.³⁴⁵ Additional measures that are considered “appropriate” for the purpose of effecting the obligations imposed on States Parties by Article 2(1) of the ICESCR, include “administrative, financial, educational and social measures.”³⁴⁶

Another “internal qualifier” placed on the South African State by the country’s Constitution as relates to the realization of the ESC rights is the requirement that “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the *progressive realization* of this right.”³⁴⁷ This internal qualifier is analogous to that found in Article 2(1) of the ICESCR that States Parties must “take steps . . . with a view to achieving progressively the full realization of the rights recognized” in the ICESCR.³⁴⁸

Due to resource scarcity, the realization of the ESC rights requires time, especially in countries, such as those in Africa, with extremely high rates of poverty. Many of these economies are unable to attract the type of investment expenditures that can create both wealth and jobs as well as generate the revenues that the government needs to realize the ESC rights. In addition, these countries face additional challenges from dysfunctional governing processes which endanger peace and security.³⁴⁹ The absence of peace and security in

³⁴⁵ See Pius Nkondo Langa, *The Protection of Human Rights by the Judiciary and Other Structures in South Africa*, 52 SMU L. REV. 1531 (1999) (examining, inter alia, the role of the judiciary in the promotion and protection of human rights in post-apartheid South Africa).

³⁴⁶ CESCR General Comment No. 3, *supra* note 330, para. 7.

³⁴⁷ CONST. S. AFR., 1996, § 26(2).

³⁴⁸ See ICESCR, *supra* note 333, art. 2(1). See also CESCR General Comment No. 3, *supra* note 330, para. 9 (noting, inter alia, that “[t]he concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.”).

³⁴⁹ In countries, such as Central African Republic, Libya, Somalia, and South Sudan, the absence of effective and fully functioning governance systems has exacerbated violent conflict between subcultures and created an environment that is antithetical to entrepreneurship and the creation of the wealth that could be used to realize ESC rights. Even in countries with more effective and democratic governance institutions (e.g., Nigeria and Kenya), corruption and other forms of political

these countries threatens the type of investment that could create the wealth needed to significantly improve the fulfilment of the ESC rights. Hence, “[b]ecause the full realization of socio-economic rights (including hospitals and universities, training doctors, et cetera) takes time, an obligation to realize the rights fully immediately would be unrealistic—the obligation is accordingly tempered to require only the full realization of the rights over time.”³⁵⁰

This, however, is not a “blanket reprieve,”³⁵¹ which may allow the State to take as long as it wishes to fulfil the obligations imposed on it by the ICESCR and, in the case of South Africa and other countries, their national constitutions. However, as the CESCR argues in its General Comment No. 3, while States Parties do have some level of flexibility when it comes to the realization of the ESC rights, each State Party, nevertheless, is required “to move as expeditiously and effectively as possible towards [the realization of the rights spelled out in the ICESCR].”³⁵² As reflected in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, “[t]he fact that the full realization of most economic, social and cultural rights can only be achieved progressively, . . . does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible.”³⁵³ Thus, “the burden is on the State to demonstrate that it is making measurable progress

opportunism continue to obstruct economic growth and wealth creation. *See, e.g.,* Jorge C. Carrasco, *Africa’s Economic Development is Impeded by Corruption and Populism*, FOUNDATION FOR ECONOMIC EDUCATION, Dec. 30, 2018, <https://fee.org/articles/africa-s-economic-development-is-impeded-by-corruption-and-populism/> (Dec. 12, 2019); THE CHALLENGE OF GOVERNANCE IN SOUTH SUDAN: CORRUPTION, PEACEBUILDING, AND FOREIGN INTERVENTION (Steven C. Roach & Derrick K. Hudson eds., 2018) (presenting a series of essays that examines, inter alia, obstacles to human development in South Sudan); MEGAN BRADLEY, IBRAHIM FRAIHAT & HOUDA MZIOUDET, LIBYA’S DISPLACEMENT CRISIS: UPROOTED BY REVOLUTION AND CIVIL WAR (2016) (examining, inter alia, Libya’s descend into anarchy).

³⁵⁰ Heyns and Brand, *supra* note 245, at 160.

³⁵¹ Heyns and Brand, *supra* note 245, at 160.

³⁵² CESCR General Comment No. 3, *supra* note 330, para. 9.

³⁵³ *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Jan. 22–26, 1997, http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html (Nov. 1, 2019), at para. 8.

toward the full realization of the rights in question.”³⁵⁴ In addition, the State cannot “justify derogations or limitations of rights recognized in the [ICESCR] because of different social, religious and cultural backgrounds.”³⁵⁵ The Maastricht Principles also state that “resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.”³⁵⁶

The CESCR also talks in terms of a “minimum core obligation [on the part of States Parties] to ensure the satisfaction of, at the very least, minimum essential levels of each of the [ESC] rights.”³⁵⁷ As an example, the CESCR states that a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the [ICESCR].³⁵⁸

1. The South African Constitution and Priority Rights

Some scholars have distinguished between ESC rights that are not subject to internal constitutional qualifications, which they call “priority obligations” and those that are subject to internal constitutional qualifications or “internally qualified rights.”³⁵⁹ The South African Constitution creates priority rights through certain provisions. First, § 29(1)(a), which is part of the Bill of Rights, provides that “[e]veryone has the right—(a) to a basic education, including adult basic education.”³⁶⁰ Second, the Interim Constitution also made similar guarantees—§ 32(a) provides that “[e]very person shall have the right—(a) to basic education and to equal access to educational institutions.”³⁶¹ In *In re Gauteng School Education Bill of 1995*, the

³⁵⁴ Maastricht Guidelines, *supra* note 353, at para. 8.

³⁵⁵ Maastricht Guidelines, *supra* note 353, at para. 8.

³⁵⁶ Maastricht Guidelines, *supra* note 353, at para. 8.

³⁵⁷ CESCR General Comment No. 3, *supra* note 330, para. 10.

³⁵⁸ CESCR General Comment No. 3, *supra* note 330, para. 10.

³⁵⁹ Heyns and Brand, *supra* note 245, at 161.

³⁶⁰ CONST. S. AFR., 1996, § 29(1)(a).

³⁶¹ Interim Constitution of the Republic of South Africa (Act No. 200 of 1993), <https://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993> (Nov. 1, 2019), art. 32(a).

Constitutional Court of South Africa held that § 32(a) of the Interim Constitution “creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.”³⁶² In *Motala and Another v. University of Natal*, a case that was decided in 1995 under the Interim Constitution and before the permanent constitution was adopted in 1996, the then Supreme Court held that the expression “basic education” as it is used in § 32(a) “does not include institutions of higher learning.”³⁶³

Third, South Africa’s Bill of Rights also defines the rights of “[a]rrested, detained and accused persons.”³⁶⁴ Section 35(2)(e) provides that “[e]veryone who is detained, including every sentenced prisoner, has the right—(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.”³⁶⁵ The interpretation of this section, in so far as it relates to “adequate medical treatment” was the subject of *Van Biljon and Others v. Minister of Correctional Services and Others*.³⁶⁶

In this case, a group of South African prisoners, who were HIV positive and had reached the symptomatic stage of the disease (i.e., AIDS), had claimed that they had a constitutionally-guaranteed right to be provided anti-viral medication at government expense as per § 35(2)(e).³⁶⁷ The High Court (Cape of Good Hope Provincial Division) was called upon to decide two issues. The first issue was whether prisoners living with HIV who had reached the symptomatic stage of the disease were entitled to be prescribed antiretroviral treatment. The second issue was directly related to the first: if, indeed, these prisoners were entitled to be prescribed antiretroviral treatment, would such an

³⁶² In re Gauteng School Education Bill of 1995, [1996] ZACC 4; 1996 C4) BCLR 537; 1996 (3) SA 165 (Apr. 4, 1996), para. 9 per Mahomed DP.

³⁶³ *Motala and Another v. University of Natal*, 1995 (3) BCLR 374 (D); 1995 SACLX 256, at 2.

³⁶⁴ CONST. S. AFR., 1996, § 35.

³⁶⁵ CONST. S. AFR., 1996, § 35(2)(e).

³⁶⁶ *Van Biljon and Others v. Minister of Correctional Services and Others*, 1997 (4) SA 441 (C); 1997 (6) BCLR 789 (C). This case is also cited as *B and Others v. Minister of Correctional Services and Others*.

³⁶⁷ CONST. S. AFR., 1996, § 35(2)(e).

entitlement be at government expense? The “Court held that the first question was not within its purview to decide, as it was a purely medical assessment.”³⁶⁸ With respect to the second question, the Court “held that a lack of funds did not justify the Government’s failure to realize a prisoner’s right to adequate medical treatment.”³⁶⁹ The Court, however, noted that “the determination of what constitutes ‘adequate medical treatment’ could not be made in a vacuum and that financial constraints could be considered when making this decision.”³⁷⁰

It has been noted that §§ 26(3) and 27(3) of the South African Constitution also “create priority obligations” on the part of the government.³⁷¹ Section 26(3) deals with “housing” and provides as follows:

No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.³⁷²

In *Despatch Municipality v. Sunridge Estate and Development Corporation (Pty) Ltd.*,³⁷³ the High Court was called upon to rule on the conflict between § 3(b) of the Prevention of Illegal Squatting Act (Act No. 52 of 1951)³⁷⁴ and § 26(3) of the South African Constitution. Section 3(b) of the 1951 law authorized the demolition of unauthorized

³⁶⁸ B and Others v. Minister of Correctional Services and Others: Judgment Details, GLOBAL HEALTH AND HUMAN RIGHTS DATABASE, <https://www.globalhealthrights.org/africa/van-biljon-and-ors-v-minister-of-correctional-services-and-ors-also-known-as-b-v-minister-of-correctional-services/> (Nov. 3, 2019).

³⁶⁹ B and Others, *supra* note 368.

³⁷⁰ B and Others, *supra* note 368. *See also* Van Biljon and Others, *supra* note 366, paras. 49, 58.

³⁷¹ Heyns and Brand, *supra* note 245, at 162.

³⁷² CONST. S. AFR., 1996, § 26(3).

³⁷³ *Despatch Municipality v. Sunridge Estate and Development Corporation (Pty) Ltd.*, 1997 (8) BCLR 1023 (SE).

³⁷⁴ Prevention of Illegal Squatting Act (Act No. 52 of 1951), § 3(b), <http://disa.ukzn.ac.za/leg19510706028020052> (Nov. 3, 2019). This statute was enacted during three years after apartheid become law in South Africa and was designed to prohibit illegal squatting and was aimed primarily at the country’s African population.

“buildings or structures” without a court order. This was directly in conflict with § 26(3) of the Constitution of South Africa. The High Court held that § 3(b) was in conflict with § 26(3) and declared the former invalid.³⁷⁵

The requirements of § 26 were also examined in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg and City of Johannesburg and Others*.³⁷⁶ In this case,

[m]ore than 400 occupiers of two buildings in the inner city of Johannesburg (the occupiers) applied for leave to appeal against a decision of the Supreme Court of Appeal. They challenged the correctness of the judgment and order of that Court authorizing their eviction at the instance of the City of Johannesburg (the City) based on the finding that the buildings they occupied were unsafe and unhealthy.³⁷⁷

Yacoob J, writing for the Constitutional Court (“CC”), noted that § 26(3) of the Constitution “prohibits eviction of people from their home absent a court order that must be made after taking into account all the relevant circumstances. It means in effect that no person may be compelled to leave their home unless there exists an appropriate court order.”³⁷⁸ In addition, the learned justice added that “[i]t follows that any provision that compels people to leave their homes on pain of criminal sanction in the absence of a court order is contrary to the provisions of section 26(3) of the Constitution.”³⁷⁹ Yacoob J also made reference to the CC’s decision in *Port Elizabeth Municipality v. Various Occupiers*,³⁸⁰ where it was held that:

³⁷⁵ Despatch Municipality, *supra* note 373.

³⁷⁶ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg and City of Johannesburg and Others*, [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (Feb. 19, 2008).

³⁷⁷ *Occupiers of 51 Olivia Road*, *supra* note 376, para. 1.

³⁷⁸ *Occupiers of 51 Olivia Road*, *supra* note 376, para. 49.

³⁷⁹ *Occupiers of 51 Olivia Road*, *supra* note 376, para. 49.

³⁸⁰ *Port Elizabeth Municipality v. Various Occupiers*, 2005 (1) SA 217 (CC).

Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquility in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that established itself on a site that has become its familiar habitat.³⁸¹

Section 27(3) of the South African Constitution provides that “[n]o one may be refused emergency medical treatment.”³⁸² The South African Constitutional Court was called upon to consider this constitutional provision in *Soobramoney v. Minister of Health (KwaZulu-Natal)*.³⁸³ In this case, the appellant was a forty-one-year old, unemployed, diabetic man, who suffered “from ischaemic heart disease and cerebro-vascular disease which caused him to have a stroke during 1996.”³⁸⁴ After his kidneys failed, he subsequently applied for dialysis at state expense but his application was not successful. The CC turned down the application. Writing for the Constitutional Court, Chaskalson P held as follows:

The applicant suffers from chronic renal failure. To be kept alive by dialysis he would require such treatment two to three times a week. This is not an emergency which calls for immediate remedial treatment. It is an ongoing state of affairs resulting from a deterioration of the applicant's renal function which is incurable. In my view section 27(3) does not apply to these facts.³⁸⁵

Chaskalson P then noted that § 27(3) only provides that

³⁸¹ Port Elizabeth Municipality, *supra* note 380, para. 17.

³⁸² CONST. S. AFR., 1996, § 27(3).

³⁸³ *Soobramoney v. Minister of Health (KwaZulu-Natal)*, [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (Nov. 27, 1997).

³⁸⁴ *Soobramoney*, *supra* note 383, para. 1.

³⁸⁵ *Soobramoney*, *supra* note 383, para. 21.

[a] person who suffers a sudden catastrophe which calls for immediate medical attention . . . should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment. What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm.³⁸⁶

2. The South African Constitution and Internally Qualified Rights

Sections 26, 27 and 29 of the South African Constitution create internally qualified rights. First, is § 26 which provides as follows:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.³⁸⁷

Second, is § 27, which provides as follows:

- (1) Everyone has the right to have access to—
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependents, appropriate assistance.

³⁸⁶ Soobramoney, *supra* note 383, para. 20.

³⁸⁷ CONST. S. AFR., 1996, § 26(1–2).

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.³⁸⁸

Note that § 27(1)(a) and § 27(2)³⁸⁹ were dealt with by the Constitutional Court in *Soobramoney* where the applicant made a claim for kidney dialysis treatment at state expense after invoking § 27(3). The Constitutional Court rejected his application, based on the right to “emergency medical treatment”³⁹⁰ and the “right to life.”³⁹¹ Nevertheless, Chaskalson P, writing for the CC, attempted to determine if the applicant’s application could succeed on the basis of § 27(1)(a)’s “right to have access to—(a) health care services.”³⁹² The Court noted that the right described in § 27(1)(a) is qualified by § 27(2)—the State is only required by the Constitution to give effect to the right contained in § 27(1)(a) “within its available resources.”³⁹³

Chaskalson P then noted that “[i]n the Court a quo Combrinck J had held that ‘[i]n this case the respondent has conclusively proved that there are no funds available to provide patients such as the applicant with the necessary treatment.’”³⁹⁴ The learned justice then went on to note that it was not only the Department of Health in KwaZulu-Natal that did not have enough funds to “cover the cost of services which are being provided to the public” but that this was “a nation-wide problem” as “resources [were] stretched in all renal clinics throughout the land.”³⁹⁵ Chaskalson P also noted that the respondent had developed guidelines that could be used to “assist the persons working in these clinics to make the agonizing choices which have to be made in deciding who should receive treatment, and who not. These guidelines were applied in the present case.”³⁹⁶

³⁸⁸ CONST. S. AFR., 1996, § 27(1–2).

³⁸⁹ As § 27(2) relates to § 27(1)(a).

³⁹⁰ CONST. S. AFR., 1996, § 27(3).

³⁹¹ CONST. S. AFR., 1996, § 11.

³⁹² CONST. S. AFR., 1996, § 27(1)(a).

³⁹³ CONST. S. AFR., 1996, § 27(2).

³⁹⁴ *Soobramoney*, *supra* note 383, para. 23.

³⁹⁵ *Soobramoney*, *supra* note 383, para. 24.

³⁹⁶ *Soobramoney*, *supra* note 383, para. 24.

Stating that “[a] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility is to deal with such matters,”³⁹⁷ Chaskalson P held that the applicant’s claim would still have failed even if “it had been brought on the basis of section 27(1)(a).”³⁹⁸

Finally, is § 29(1)(b), which provides that “[e]veryone has the right—to further education, which the state, through reasonable measures, must make progressively available and accessible.”³⁹⁹ In *Mahapa v. Minister of Higher Education and Another*,⁴⁰⁰ the High Court of South Africa (Gauteng Local Division, Johannesburg) was called upon to decide a case involving § 29(1)(b). The applicant, Desmond Mahapa, had applied for a bursary from the National Student Financial Aid Scheme (“NSFAS”) to finance his study of law at the University of South Africa (“UNISA”) but was not successful.⁴⁰¹

The applicant in *Mahapa* “contented that he [was] entitled to education at the tertiary level”⁴⁰² by virtue of the right provided him by § 29(1)(b) of the Constitution.⁴⁰³ The counsel for the Minister of Education (the first respondent) argued, however, that the first respondent had “no obligation to provide funds for the applicant to further his education” based on the strength of § 36(1) which provides that:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

³⁹⁷ Soobramoney, *supra* note 383, para. 29.

³⁹⁸ Heyns and Brand, *supra* note 245, at 163. *See also* Soobramoney, *supra* note 383, para. 31.

³⁹⁹ CONST. S. AFR., 1996, § 29(1)(b).

⁴⁰⁰ *Mahapa v. Minister of Higher Education and Another*, [2017] ZAGP JHC 9; [2017] 2 All SA 254 (GJ) (Feb. 7, 2017).

⁴⁰¹ *Mahapa*, *supra* note 400, at paras. 1–11.

⁴⁰² *Mahapa*, *supra* note 400, at para. 12.

⁴⁰³ CONST. S. AFR., 1996, § 29(1)(b).

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.⁴⁰⁴

As part of the analysis of the case, Mabesele J provided a brief review of the educational system of South Africa, with specific emphasis on access to education for African children during the apartheid era. The learned judge noted that since the end of apartheid, the “law and policies that governed and regulated [the] system of education [have] since been repealed” and that it would “not be necessary to refer to them, save to demonstrate their adverse impact on the education of the African child.”⁴⁰⁵

Mabesele J noted that during the apartheid period in South Africa, “educational policies were carefully and deliberately formulated on the basis of discrimination, with the primary intention to prevent an African child, in particular, from thinking independently, debating issues constructively and becoming self-reliant.”⁴⁰⁶ The learned judge then referred to the Constitutional Court of South Africa case, *Head of Department: Mpumalanga Department of Education and Another v. Hoërskool Ermelo and Another*,⁴⁰⁷ and highlighted what Moseneke DCJ said about the impact of apartheid on education in South Africa.

Writing for the CC in *Head of Department*, Moseneke DCJ reminded the country of the oppressive nature of the policy of apartheid on South Africa’s black population:

⁴⁰⁴ CONST. S. AFR., 1996, § 35(1)(a–e).

⁴⁰⁵ Mahapa, *supra* note 400, at para. 18.

⁴⁰⁶ Mahapa, *supra* note 400, at para. 19.

⁴⁰⁷ *Head of Department: Mpumalanga Department of Education and Another v. Hoërskool Ermelo and Another*, [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (Oct. 14, 2009).

Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorized a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequity are still with us.

It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.⁴⁰⁸

Mabesele J then noted that section 29(1) was designed to address these extreme inequalities in the distribution of educational opportunities.⁴⁰⁹ However, § 29(1) distinguishes between an *immediately realizable* right and one that is *progressively realizable given available resources*. The right to “basic education” is provided for in § 29(1)(a)—Mabesele J argues that this right is “immediately realizable.”⁴¹⁰ This was made clear in *Governing Body of the Juma Masjid Primary School and Others v. Essay*

⁴⁰⁸ Head of Department, *supra* note 407, at paras. 45–46.

⁴⁰⁹ Mahapa, *supra* note 400, at para. 24.

⁴¹⁰ Mahapa, *supra* note 400, at para. 25.

N. O. and Others,⁴¹¹ where Nkabinde J, writing for the Constitutional Court, held as follows:

It is important, for the purpose of this judgment, to understand the nature of the right to “a basic education” under section 29(1)(a). *Unlike some of the other socio-economic rights, this right is immediately realizable.* There is no internal limitation requiring that the right be “progressively realized” within “available resources” subject to “reasonable legislative measures.” The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” This right is therefore distinct from the right to “further education” provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education “progressively available and accessible.”⁴¹²

Mabesele J noted that South African courts have, on several occasions, “ordered the state to comply with section 289(1)(a) in order to fulfil its constitutional obligation.”⁴¹³ For example, in *Tripartite Steering Committee and Another v. Minister of Basic Education and Others*,⁴¹⁴ the High Court of South Africa (Eastern Cape Division, Grahamstown) directed the Minister of Basic Education “to provide scholar transport . . . to the scholars”⁴¹⁵ who lived very far away from their school and were unable to afford the cost of transportation. In the High Court’s view, the right to basic education would be

⁴¹¹ *Governing Body of the Juma Masjid Primary School and Others v. Essay N. O. and Others*, [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (Apr. 11, 2010).

⁴¹² *Governing Body*, *supra* note 411, at para. 37. Emphasis added. Footnotes omitted.

⁴¹³ *Mahapa*, *supra* note 400, at para. 26.

⁴¹⁴ *Tripartite Steering Committee and Another v. Minister of Basic Education and Others*, [2015] ZAECHGHC 67; 2015 (5) SA 107 (ECG); [2-15] 3 All SA 718 (ECG) (June 25, 2015).

⁴¹⁵ *Tripartite Steering Committee*, *supra* note 414, para. 67.

meaningless if students could not get to school to receive that education. Specifically, the High Court declared that:

The right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, text books from which to learn and *transport to and from school at State expense in appropriate cases*.⁴¹⁶

In *Section 27 & Others v. Minister of Education and Another*, Kollapen J came to a similar conclusion as that reached in *Tripartite Steering Committee*. The learned judge declared that “the failure by the Limpopo Department of Education and the Department of Basic Education to provide text books to schools in Limpopo is a violation of a right to basic education.”⁴¹⁷ The learned judge ordered the Limpopo Department of Education/Department of Basic Education “to provide text books for Grades R, 1, 2, 3 and 10 on an urgent basis.”⁴¹⁸

Kollapen J’s ruling in *Section 27 & Others* was appealed to the Supreme Court of Appeal of South Africa by the Minister of Basic Education and other Limpopo officials.⁴¹⁹ In dismissing the appeal, Navsa J (with Lewis, Cachalia, Petse and Dambuza JJA concurring) “declared that § 29(1)(a) of the Constitution entitles every learner at public schools in Limpopo to be provided with every textbook prescribed for his or her grade before commencement of the teaching of the course for which the textbook is prescribed.”⁴²⁰ The learned judge declared further that “it is the duty of the State, in terms of s 7(2) of the Constitution, to fulfil the s 29(1)(a) right of every learner by providing him or her with every textbook prescribed for his or her grade before commencement of the teaching of the course for which

⁴¹⁶ Tripartite Steering Committee, *supra* note 414, para. 17, Plasket J citing to Kollapen J in *Section 27 & Others v. Minister of Education and Another*, [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP) (May 17, 2012).

⁴¹⁷ *Section 27 & Others*, *supra* note 416, at para. 20(2).

⁴¹⁸ *Section 27 & Others*, *supra* note 416, at para. 20(3).

⁴¹⁹ *Minister of Basic Education v. Basic Education for All*, [2015] ZASCA 198; [2016] 1 All SA 369 (SCA); 2016 (4) SA 63 (SCA) (Dec. 2, 2015).

⁴²⁰ *Basic Education for All*, *supra* note 419, at para. 3(1).

the textbook is prescribed.”⁴²¹ Finally, Navsa J declared that “the National Department of Basic Education and the Limpopo Department of Education violated the s 29(1)(a), s 9 (equality) and s 10 (dignity) rights of learners in Limpopo in 2014 by failing to provide all of them with every prescribed textbook before commencement of the teaching of the courses for which they were prescribed.”⁴²²

While § 29(1)(a) deals with rights to basic education, § 29(1)(b) addresses the “right to further [tertiary] education.”⁴²³ The applicant in *Mahapa* relied on § 29(1)(b) to seek a bursary from the Minister of Higher Education to fund his study of the law.⁴²⁴ Mabesele J, writing for the High Court in *Mahapa*, noted that “[u]nlike section 29(1)(a), [§ 29(1)(b)] . . . has internal limitation, requiring the state to be obliged, through reasonable measures, to make further education ‘*progressively available and accessible*.’”⁴²⁵ The learned judge went on to declare that “[r]egrettably, this right is distinct from [the] right to basic education, which is immediately realizable, and with no internal limitation requiring that it be ‘*progressively realized*’ within ‘available resources’ subject to ‘reasonable legislative measures.’”⁴²⁶

Mabesele J also noted that § 29(1)(a) “is intended to eradicate illiteracy and promote literacy to enable everyone to understand the society in which they live and to fit well in that modern society.”⁴²⁷ On the other hand, § 29(1)(b) is designed to help individuals obtain the training, education, and the skills that they need to develop into productive and economically-viable adults.⁴²⁸ The learned judge then dismissed Desmond Mahapa’s application and declared that the Minister of Education did not owe any obligation to Mahapa, arising from section 29(1)(b), to protect the applicant’s right to further his education, by providing him with funds.”⁴²⁹

⁴²¹ Basic Education for All, *supra* note 419, at para. 3(2).

⁴²² Basic Education for All, *supra* note 419, at para. 3(3).

⁴²³ CONST. S. AFR., 1996, §§ 29(1)(a) and 29(1)(b).

⁴²⁴ Mahapa, *supra* note 400, at para. 30.

⁴²⁵ Mahapa, *supra* note 400, at para. 30.

⁴²⁶ Mahapa, *supra* note 400, at para. 31. Emphasis in original.

⁴²⁷ Mahapa, *supra* note 400, at para. 31.

⁴²⁸ Mahapa, *supra* note 400, at para. 31.

⁴²⁹ Mahapa, *supra* note 400, at para. 31.

3. Other ESC Rights in South Africa's Constitution

There are other economic, social and cultural rights that are enshrined in the Bill of Rights but which “do not fit easily into the scheme of ‘priority’ rights and ‘internally qualified’ rights” examined earlier. Section 23 defines rights related to labor relations. According to § 23,

- (1) Everyone has the right to fair labor practices.
- (2) Every worker has the right—
 - (a) to form and join a trade union;
 - (b) to participate in the activities and program of a trade union; and
 - (c) to strike.
- (3) Every employer has the right—
 - (a) to form and join an employers' organization; and
 - (b) to participate in the activities and programs of an employers' organization.
- (4) Every trade union and every employers' organization has the right—
 - (a) to determine its own administration, programs and activities;
 - (b) to organize; and
 - (c) to form and join a federation.
- (5) Every trade union, employers' organization and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the

legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

(6) National legislation may recognize union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

Under South Africa's Constitution and as examined earlier, all these rights, the ESC rights, the priority rights, the internally qualified rights, and the labor rights, "are subject to the general limitations clause."⁴³⁰

III. INTERNATIONAL LAW AND THE INTERPRETATION AND ADJUDICATION OF CASES INVOLVING ESC RIGHTS IN SOUTH AFRICA'S BILL OF RIGHTS

A. Introduction

Since the end of apartheid and the emergence of a non-racial, multiparty, democratic dispensation in the Republic of South Africa, whose foundation was the Constitution of the Republic of South Africa, 1996, there has been intense debate about the justiciability of economic, social and cultural ("ESC") rights. The designers of South Africa's post-apartheid constitution specifically included ESC rights in the Bill of Rights.⁴³¹ One important part of the debate on ESC rights centered around the "fact that the protection of such rights is dependent on the availability of resources."⁴³² Hence, some commentators have argued that "it is meaningless to provide for such rights without the resource capacity to ensure their protection."⁴³³

Arguments for and against inclusion of ESC rights in the Bill of Rights "were considered in the First Certificate Judgment in which

⁴³⁰ Heyns and Brand, *supra* note 245, at 163.

⁴³¹ John Cantius Mubangizi, *The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation*, 2 AFR. J. LEGAL STUD. 1, 3 (2006).

⁴³² Mubangizi, *supra* note 431, at 3.

⁴³³ Mubangizi, *supra* note 431, at 3.

the Constitutional Court held that although socio-economic rights are not universally accepted as fundamental rights, they 'are, at least to some extent justiciable; and at the very minimum can be negatively protected from invasion.'⁴³⁴ As noted by the Constitutional Court in the case, *Certification of the Constitution of the Republic of South Africa, 1996*,⁴³⁵ "[t]he formal purpose of [the judgment in this case] is to pronounce whether or not the Court certifies that all the provisions of South Africa's proposed new constitution comply with certain principles contained in the country's current constitution."⁴³⁶ Specifically, the Constitutional Court held, in *Certification of the Constitution of the Republic of South Africa, 1996*, that:

we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the NT⁴³⁷ will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability.⁴³⁸

⁴³⁴ Mubangizi, *supra* note 431, at 3. See also Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996, [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (Sept. 6, 1996).

⁴³⁵ *Certification of the Constitution of the Republic of South Africa, 1996*, *supra* note 434.

⁴³⁶ *Certification of the Constitution of the Republic of South Africa, 1996*, *supra* note 434, at para. 1. The reference to the "country's current constitution" was to the Interim Constitution, officially known as *Constitution of the Republic of South Africa (Act 200 of 1993)*. The principles mentioned are those contained in Schedule 4 of the Interim Constitution and called "Constitutional Principles." See Interim Constitution, Schedule 4. In order for the Constitutional Court to certify the final and permanent Constitution, § 71 of the Interim Constitution imposed the following conditions: "A new constitutional text shall—(a) comply with the Constitutional Principles contained in Schedule 4; and (b) be passed by the Constitutional Assembly in accordance with this Chapter." See Interim Constitution, *id.* at § 71.

⁴³⁷ "NT" refers to New Text (that is, the 1996 Constitution) to distinguish it from the Interim Constitution, 1993.

⁴³⁸ *Certification of the Constitution of the Republic of South Africa, 1996*, *supra* note 434, at para. 78. One of the objections of the inclusion of the socio-

Since South Africa adopted its permanent Constitution, the issue of the availability of resources “has been raised in all cases that have come before the Constitutional Court involving socio-economic rights.”⁴³⁹ It has been noted that although the Constitutional Court “initially stuttered in its decision in *Soobramoney v. Minister of Health, KwaZulu-Natal*, it was later to redeem itself in the subsequent decisions in *Government of the Republic of South Africa v. Grootboom*, *Minister of Health and Others v. Treatment Action Campaign and Others*, and *Khosa v. Minister of Social Development*.”⁴⁴⁰ Ngwena and Cook have argued that “what is missing from *Soobramoney* is a systematic approach to the determination of a socio-economic rights and a clear articulation of the normative content of the right to health care services.”⁴⁴¹ In addition, they argued that:

Soobramoney did not really lay down any guidelines that could be followed when interpreting socio-economic rights so as to illuminate and indigenize jurisprudence on socio-economic rights and also to guide lower courts with jurisdiction to determine constitutional matters. The Court did not consider how the right to health or the right of access to health care has been interpreted under international human rights instruments. In particular, the Court failed to make use of jurisprudence that has been developed by the Committee on [Economic, Social and Cultural Rights]. Thus, while the Court arrived at the correct conclusion, its approach fell short of a diligent consideration of relevant law.⁴⁴²

economic rights in the country’s permanent constitution was “socio-economic rights are not justiciable, in particular because of the budgetary issues their enforcement may raise.” *Id.* at para. 78.

⁴³⁹ Mubangizi, *supra* note 431, at 3.

⁴⁴⁰ Mubangizi, *supra* note 431, at 3–4. Footnotes omitted.

⁴⁴¹ Ngwena and Cook, *infra* note 442, at 127.

⁴⁴² Charles Ngwena and Rebecca Cook, *Rights Concerning Health*, in *SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA* 107, 137–138 (Danie Brand & Christof Heyns eds., 2005).

The Constitutional Court's decisions in the last three cases listed above have been in line with the comments of the UN Committee on Economic, Social and Cultural Rights ("CESCR") on the obligations of States Parties under the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). With respect to the ability of States Parties to attribute their failure to meet their minimum obligations under the ICESCR on a lack of available resources, the CESCR made the following declaration:

In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.⁴⁴³

The decisions of South Africa's highest court, the Constitutional Court, in several cases, have effectively settled the debate on the justiciability of socio-economic rights in the country. Yacoob J has noted that "[d]uring argument [in *The Government of the Republic of South Africa and Others v. Grootboom and Others*],⁴⁴⁴ considerable weight was attached to the value of international law in interpreting section 26 of the Constitution."⁴⁴⁵ Section 26 of the Constitution of the Republic of South Africa, which is part of the country's Bill of Rights, defines rights related to housing. This section states specifically that:

(1) Everyone has the right to have access to adequate housing.

⁴⁴³ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations* (art. 2, para. 1, of the ICESCR), para. 10.

⁴⁴⁴ *The Government of the Republic of South Africa and Others v. Grootboom and Others*, [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (Oct. 4, 2000).

⁴⁴⁵ *Grootboom*, *supra* note 444, at para. 26.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.⁴⁴⁶

Section 39 of the South African Constitution provides modalities for interpreting the Bill of Rights.⁴⁴⁷ This section imposes an obligation on South African courts to “consider international law as a tool to interpretation of the Bill of Rights.”⁴⁴⁸ Specifically, § 39 provides as follows:

(1) When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or

⁴⁴⁶ CONST. S. AFR., 1996, § 26(1–3).

⁴⁴⁷ CONST. S. AFR., 1996, § 39.

⁴⁴⁸ Grootboom, *supra* note 444, at para. 26.

legislation, to the extent that they are consistent with the Bill.⁴⁴⁹

In *Makwanyane*, a case that was decided under South Africa's Interim Constitution,⁴⁵⁰ Chaskalson P, writing in the context of § 35(1) of that Constitution,⁴⁵¹ declared as follows:

[P]ublic international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialized agencies such as the International Labor Organization, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].⁴⁵²

In the section that follows, we shall examine two South African cases to see how the country's courts have utilized international law as a tool of interpretation in deciding cases involving the economic, social

⁴⁴⁹ CONST. S. AFR., 1996, § 39(1–3). Emphasis added.

⁴⁵⁰ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 200 OF 1993, <https://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993> (Nov. 4, 2019).

⁴⁵¹ Section 35(1) of the Interim Constitution states as follows: “In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.” *Id.* at § 35(1). Emphasis added.

⁴⁵² *S v. Makwanyane and Another*, [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (June 6, 1995), para. 35. Footnotes omitted.

and cultural rights contained in the Bill of Rights. These cases were chosen because it was the Constitutional Court's rulings in them that settled the debate on the justiciability of socio-economic rights in the Republic of South Africa and established the legal foundation for the protection of ESC rights in the country. A recent report by the South African Department of Justice and Constitutional Development noted that although the government has been providing "free housing to the poor" for a while, "the *Grootboom* judgment" (*Grootboom* is one of the cases examined), however, "made it mandatory for the State to put in place mechanisms that would speed up this process and provide shelter in emergency situations. [*Grootboom*] led to the introduction of a new Housing Code that sought to respond to the [Constitutional Court's] judgment and order."⁴⁵³ *Grootboom*, as well as the other case examined below—*Minister of Health and Others v. Treatment Action Campaign and Others*—can be considered foundational cases in the development of South Africa's jurisprudence on the enforcement of socio-economic rights.

B. The Government of the Republic of South Africa and Others v. *Grootboom* and Others (Constitutional Court of South Africa)

In *Grootboom and Others*,⁴⁵⁴ Mrs. Irene Grootboom and several other respondents⁴⁵⁵ had been evicted from their "informal homes

⁴⁵³ N. Bohler-Muler, et al, *Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society: Final Report* (Commissioned by the Department of Justice and Constitutional Development), Nov. 2015, http://repository.hsrc.ac.za/bitstream/handle/20.500.11910/1768/8835_Final%20report.pdf?sequence=1&isAllowed=y (Dec. 13, 2019), at 88. See also John Cantius Mubangizi, *The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation*, 2 AFR. J. LEGAL STUD. 1, 4 (2006). The report produced by Bohler-Muller and his colleagues at the Human Sciences Research Council ("HSRC") and the Nelson Mandela School of Law of the University of Fort Hare noted that the "*Grootboom* case had a marked impact on the development of South African constitutional jurisprudence, particularly on the enforcement of socio-economic rights" and that it also "had a major impact on housing policy in South Africa." Bohler-Muller, *id.* at 89.

⁴⁵⁴ *Grootboom and Others*, *supra* note 444.

⁴⁵⁵ The respondents consisted of 510 children and 390 adults. Mrs. Grootboom, who was the first respondent, had brought an application before the

situated on private land earmarked for formal low-cost housing”⁴⁵⁶ and hence, rendered homeless. After they were evicted, the respondents made an application to the Cape of Good Hope High Court “for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief.”⁴⁵⁷ The High Court ordered the appellants “to provide the respondents who were children and their parents with shelter. The judgment provisionally concluded that ‘tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum.’”⁴⁵⁸ Subsequently, “[t]he appellants who represent all spheres of government responsible for housing challenge[d] the correctness of that order.”⁴⁵⁹

During the court hearing on the matter, the appellants made an offer “to ameliorate the immediate crisis situation in which the respondents were living. The offer was accepted by the respondents.”⁴⁶⁰ Nevertheless, four months after the offer was made and accepted, the appellants had not yet complied with the terms of the offer and the respondents “made an urgent application to [the Constitutional Court]” and the CC, “after communication with the parties, crafted an order putting the municipality on terms to provide certain rudimentary services.”⁴⁶¹

Yacoob J, writing for the Constitutional Court, began his analysis with an overview of the history of housing discrimination under apartheid and how the latter’s policies affected African people’s

High Court on behalf of all the respondents. *See* Grootboom and Others, *supra* note 444, para. 4(fn. 2).

⁴⁵⁶ Grootboom and Others, *supra* note 444, para. 4.

⁴⁵⁷ Grootboom and Others, *supra* note 444, para. 4.

⁴⁵⁸ Grootboom and Others, *supra* note 444, para. 4.

⁴⁵⁹ Grootboom and Others, *supra* note 444, para. 4. The appellants were the Government of the Republic of South Africa, the Premier of the Province of the Western Cape representing the Western Cape Provincial Government, the Cape Metropolitan Council, and the Oostenberg Municipality, all of which are organs of the Government of the Republic of South Africa at the central, provincial, and municipal levels. *See id.* at fn 5.

⁴⁶⁰ Grootboom and Others, *supra* note 444, para. 5.

⁴⁶¹ Grootboom and Others, *supra* note 444, para. 5.

access to housing.⁴⁶² One consequence of apartheid housing and influx control policies was that they forced many people into “rudimentary *informal settlements* providing for minimal shelter, but little else.”⁴⁶³ The learned justice then went on to describe the horrible conditions which Mrs. Grootboom and the other respondents, who lived in an informal settlement called Wallacedene, were subjected to.⁴⁶⁴

Although Mrs. Grootboom and the others had applied to the municipal government for “subsidized low-cost housing,”⁴⁶⁵ none was forthcoming even after seven years of waiting. So, many of them moved out of Wallacedene at the end of September 1998 and subsequently “put up their shacks and shelters on vacant land that was privately owned and had been earmarked for low-cost housing. They called the land ‘New Rust.’”⁴⁶⁶ In December 1998, the owner of the land on which Mrs. Grootboom and the others had settled “obtained an ejectment order against them in the magistrates’ court” and after negotiations, an order of eviction was granted “requiring the occupants to vacate New Rust and authorizing the sheriff to evict them and to dismantle and remove any of their structures remaining on the land on 19 May 1999.”⁴⁶⁷

Yacoob J noted that “although the validity of the eviction order [had] never been challenged,” to determine its validity under “the provisions of the Prevention of Illegal Eviction from the Unlawful Occupation of Land Act, 19 of 1998,” it had to be “accepted as correct.”⁴⁶⁸ The learned justice then stated that the respondents “were forcibly evicted at the municipality’s expense” and that “[t]his was done prematurely and inhumanely: reminiscent of apartheid-style evictions. The respondents’ homes were bulldozed and burnt and their possessions destroyed. Many of the residents who were not there could not even salvage their personal belongings.”⁴⁶⁹ The respondents

⁴⁶² Grootboom and Others, *supra* note 444, para. 6.

⁴⁶³ Grootboom and Others, *supra* note 444, para. 6. Emphasis added.

⁴⁶⁴ Grootboom and Others, *supra* note 444, para. 7.

⁴⁶⁵ Grootboom and Others, *supra* note 444, para. 8.

⁴⁶⁶ Grootboom and Others, *supra* note 444, para. 8.

⁴⁶⁷ Grootboom and Others, *supra* note 444, para. 9.

⁴⁶⁸ Grootboom and Others, *supra* note 444, para. 10.

⁴⁶⁹ Grootboom and Others, *supra* note 444, para. 10.

subsequently sought shelter at the Wallacedene sports field. Shortly thereafter, their attorney “wrote to the municipality [and described] the intolerable conditions under which his clients were living and demanded that the municipality meet its constitutional obligations and provide temporary accommodation to the respondents.”⁴⁷⁰

Not satisfied with the municipality’s response, the respondents “launched an urgent application in the High Court on 31 May 1999” and the High Court subsequently “granted relief to the respondents and the appellants [appealed] against that relief.”⁴⁷¹ Yacoob J then proceeded to outline the “reasoning adopted in the High Court judgment.”⁴⁷² The learned justice noted that Mrs. Grootboom and the other respondents based their claim on § 26 of the Constitution, which provides that “[e]veryone has the right to have access to adequate housing”⁴⁷³ and imposes an obligation on the State “to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.”⁴⁷⁴ The respondents also invoked § 28(1)(c) of the Constitution to support their claim.⁴⁷⁵

Yacoob J noted that the High Court judgment consisted of two separate parts. First, the High Court considered the respondent’s claim under § 26 of the Constitution and concluded that:

In short [appellants] are faced with a massive shortage in available housing and an extremely constrained budget. Furthermore in terms of the pressing demands and scarce resources [appellants] had implemented a housing program in an attempt to maximize available resources to redress the housing shortage. For this reason it could not be said that [appellants] had not taken reasonable legislative and other measures within

⁴⁷⁰ Grootboom and Others, *supra* note 444, para. 11.

⁴⁷¹ Grootboom and Others, *supra* note 444, para. 11.

⁴⁷² Grootboom and Others, *supra* note 444, para. 12.

⁴⁷³ CONST. S. AFR., 1996, § 26(1).

⁴⁷⁴ CONST. S. AFR., 1996, § 26(2).

⁴⁷⁵ Section 28(1)(c) provides that “[e]very child has the right—(c) to basic nutrition, *shelter*, basic health care services and social services.” CONST. S. AFR., 1996, § 28(1)(c). Emphasis added.

its available resources to achieve the progressive realization of the right to have access to adequate housing.⁴⁷⁶

The High Court then rejected the “argument that the right of access to adequate housing under section 26 included a minimum core entitlement to shelter in terms of which the state was obliged to provide some form of shelter pending implementation of the program to provide adequate housing.”⁴⁷⁷ Yacoob J then noted that the second part of the High Court’s judgment “addressed the claim of the children for shelter in terms of section 28(1)(c).”⁴⁷⁸ The learned justice went on to note that the High Court “reasoned that the parents bore the primary obligation to provide shelter for their children, but that section 28(1)(c) imposed an obligation on the state to provide that shelter if parents could not” and that the “shelter to be provided according to this obligation was a significantly more rudimentary form of protection from the elements than is provided by a house and falls short of adequate housing.”⁴⁷⁹

The High Court then concluded that “an order which enforces a child’s right to shelter should take account of the need of the child to be accompanied by his or her parent. Such an approach would be in accordance with the spirit and purport of section 28 as a whole.”⁴⁸⁰ Yacoob J then reviewed the High Court’s order—the Court had ordered as follows:

(2) It is declared, in terms of section 28 of the Constitution that;

(a) the applicant children are entitled to be provided with shelter by the appropriate organ or department of state;

⁴⁷⁶ Grootboom and Others, *supra* note 444, para. 14.

⁴⁷⁷ Grootboom and Others, *supra* note 444, para. 14.

⁴⁷⁸ Grootboom and Others, *supra* note 444, para. 15.

⁴⁷⁹ Grootboom and Others, *supra* note 444, para. 15.

⁴⁸⁰ Grootboom and Others, *supra* note 444, para. 15.

(b) the applicant parents are entitled to be accommodated with their children in the foregoing shelter; and

(c) the appropriate organ or department of state is obliged to provide the applicant children, and their accompanying parents, with such shelter until such time as the parents are able to shelter their own children.⁴⁸¹

Yacoob J then proceeded to outline the argument in the Constitutional Court (“CC”). The learned justice noted that the “[w]ritten argument submitted on behalf of the appellants and the respondents concentrated on the meaning and import of the shelter component and the obligations imposed upon the state by section 28(1)(c).”⁴⁸² Yacoob J also noted that

[t]he written argument filed on behalf of the *amici* sought to broaden the issues by contending that all the respondents, including those of the adult respondents without children, were entitled to shelter by reason of the minimum core obligation incurred by the state in terms of section 26 of the Constitution. It was further contended on behalf of the *amici* that the children’s right to shelter had been included in section 28(1)(c) to place the right of children to this minimum core beyond doubt.⁴⁸³

Yacoob J then noted that the “key constitutional provisions at issue in [the case at bar] are section 26 and section 28(1)(c).”⁴⁸⁴ The learned justice then noted that “[w]hile the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the

⁴⁸¹ Grootboom and Others, *supra* note 444, para. 16.

⁴⁸² Grootboom and Others, *supra* note 444, para. 18.

⁴⁸³ Grootboom and Others, *supra* note 444, para. 18. Emphasis in original.

⁴⁸⁴ Grootboom and Others, *supra* note 444, para. 19. *See also* CONST. S. AFR., 1996, §§ 26 and 28(1)(c).

text of our Constitution as construed in the Certification judgment.”⁴⁸⁵ Yacoob J noted that during the certification proceedings,⁴⁸⁶ it had been “contended that [socio-economic rights] were not justiciable and should therefore not have been included in the text of the new Constitution.”⁴⁸⁷ In response, the CC held as follows:

[T]hese rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the NT will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.⁴⁸⁸

Noting that in South Africa, socio-economic rights are “expressly included in the Bill of Rights,” Yacoob J argued that the issue is not one of whether these rights are justiciable under the country’s basic law (i.e., its Constitution), “but how to enforce them in a given case.”⁴⁸⁹ The learned justice then noted that “[a]lthough the judgment of the High Court in favor of the appellants was based on the right to shelter (section 29(1)(c) of the Constitution), it is appropriate to consider the provisions of section 26 first so as to facilitate a contextual evaluation of section 29(1)(c).”⁴⁹⁰ Yacoob J then proceeded to examine the obligations imposed on the state by § 26 and discussed how to interpret this provision.⁴⁹¹ Of particular note to *Grootboom and Others* is that rights must “be interpreted and understood

⁴⁸⁵ Grootboom and Others, *supra* note 444, para. 20. The Certification judgment refers to the judgment in Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) at para. 78.

⁴⁸⁶ In Re Certification of the Constitution, *supra* note 485.

⁴⁸⁷ Grootboom and Others, *supra* note 444, para. 20.

⁴⁸⁸ Grootboom and Others, *supra* note 444, para. 20. *See also* In Re Certification of the Constitution, *supra* note 485, para. 78.

⁴⁸⁹ Grootboom and Others, *supra* note 444, para. 20.

⁴⁹⁰ Grootboom and Others, *supra* note 444, para. 20.

⁴⁹¹ Grootboom and Others, *supra* note 444, para. 20.

in their social and historical context.”⁴⁹² The right not to be discriminated against, noted Yacoob J, “must be understood against [South Africa’s] legacy of deep social inequality.”⁴⁹³

Yacoob J then cited to *Soobramoney v. Minister of Health (KwaZulu-Natal)*,⁴⁹⁴ where Chaskalson P described the context in which the Bill of Rights is to be interpreted. In that case Chaskalson P held as follows:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.⁴⁹⁵

Once the issue of the context in which the Bill of Rights was to be interpreted had been examined, the CC then moved on to consider the role of international law in the interpretation of the Constitution and noted that § 39 of the Constitution “obliges a court to consider international law as a tool to interpretation of the Bill of Rights.”⁴⁹⁶ Yacoob J then cited to Chaskalson P’s decision in *Makwanyane*,⁴⁹⁷ where Chaskalson P held that “[i]nternational agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and

⁴⁹² Grootboom and Others, *supra* note 444, para. 25.

⁴⁹³ Grootboom and Others, *supra* note 444, para. 25

⁴⁹⁴ *Soobramoney v. Minister of Health (KwaZulu-Natal)*, [1997] ZACC 17; 1998 C1) SA 765 (CC); 1997 (12) (BCLR) 1696 (Nov. 27, 1997).

⁴⁹⁵ *Soobramoney v. Minister of Health (KwaZulu-Natal)*, *supra* note 494, para. 8.

⁴⁹⁶ Grootboom and Others, *supra* note 444, para. 26.

⁴⁹⁷ *S. v. Makwanyane*, *supra* note 123.

understood.”⁴⁹⁸ The learned Chief Justice and President of the CC noted that “[t]he relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary,” however, “where the relevant principle of international law binds South Africa, it may be directly applicable.”⁴⁹⁹

Yacoob J then noted that “[t]he *amici* submitted that the International Covenant on Economic, Social and Cultural Rights (the Covenant) is of significance in understanding the positive obligations created by the socio-economic rights in the Constitution.”⁵⁰⁰ Yacoob J made reference to Article 11.1 of the Covenant, which provides as follows:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.⁵⁰¹

This case, *The Government of The Republic of South Africa*, was decided by the CC on October 4, 2000. At this time, South Africa had signed but had not yet ratified the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). The country finally

⁴⁹⁸ S. v. Makwanyane, *supra* note 123, para. 35. This case was decided under the Interim Constitution (Act 200 of 1993). In this Constitution, Chapter 3 is “Fundamental Rights.”

⁴⁹⁹ Grootboom and Others, *supra* note 444, para. 26. Footnotes omitted.

⁵⁰⁰ Grootboom and Others, *supra* note 444, para. 27. Emphasis in original.

⁵⁰¹ *International Covenant on Economic, Social and Cultural Rights* (ICESCR), UNGA Res. 2200A(XXI) (Dec. 16, 1966), <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (Nov. 5, 2019), art. 11(1).

ratified the ICESCR on January 12, 2015.⁵⁰² Article 11(1), Yacoob J argued, must be read with Article 2(1), which provides that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁵⁰³

The learned justice then proceeded to examine the “differences between the relevant provisions of the Covenant and [South Africa’s] Constitution” and noted that these differences are “significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of section 26.”⁵⁰⁴ The differences, “in so far as they relate to housing,” Yacoob J noted, are:

- (a) The Covenant provides for a *right to adequate housing* while section 26 provides for a *right of access* to adequate housing.
- (b) The Covenant obliges states parties to take *appropriate steps* which must include legislation while the Constitution obliges the South African state to take *reasonable* legislative and other measures.⁵⁰⁵

The UN Committee on Economic, Social and Cultural Rights (“CESCR”) is tasked with the job of monitoring the actions undertaken by States Parties to ensure compliance with the ICESCR. Yacoob J noted that the *amici* in this case had relied on “the relevant

⁵⁰² United Nations Treaty Series, *International Covenant on Economic, Social and Cultural Rights: Status of Treaties*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en (Nov. 5, 2019).

⁵⁰³ ICESCR, *supra* note 501, art. 2(1).

⁵⁰⁴ Grootboom and Others, *supra* note 444, para. 28.

⁵⁰⁵ Grootboom and Others, *supra* note 444, para. 28.

general comments issued by the [CESCR] concerning the interpretation and application of the [ICESCR], and argued that these general comments constitute a significant guide to the interpretation of section 26.”⁵⁰⁶ The amici noted that in interpreting § 26 of the Constitution, the court should pay particular attention to paragraph 10 of the CESCR’s General Comment No. 3, which states as follows:

On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties’ reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to

⁵⁰⁶ Grootboom and Others, *supra* note 444, para. 29.

satisfy, as a matter of priority, those minimum obligations.⁵⁰⁷

Yacoob J then noted that “[i]t is clear from [the extract above] that the [CESCR] considers that every [State Party] is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum essential level of the socio-economic rights, including the right to adequate housing.”⁵⁰⁸ Thus, argued the learned justice, “a state in which a significant number of individuals is deprived of basic shelter and housing is regarded as *prima facie* in breach of its obligations under the Covenant.”⁵⁰⁹ Each State Party, hence, must “demonstrate that every effort has been made to use all the resources at its disposal to satisfy the minimum core of the right.”⁵¹⁰ The CESCR’s General Comment, however, does not define what it means by “minimum core.”⁵¹¹

Noting that the “[m]inimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question,” Yacoob J then concluded that “[i]t is in this context that the concept of minimum core obligation must be understood in international law.”⁵¹² With respect to the determination of a minimum core in the context of “the right to have access to adequate housing,”⁵¹³ Yacoob J noted that the Court “did not have sufficient information to determine what would comprise the minimum core obligation in the context of [the South African] Constitution.”⁵¹⁴ It was not necessary, the learned justice stated, for the Court to “decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right.”⁵¹⁵

⁵⁰⁷ Office of the High Commissioner for Human Rights, *CESCR General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant)*, Doc. E/199/23 (Dec. 14, 1990), para. 10.

⁵⁰⁸ Grootboom and Others, *supra* note 444, para. 30.

⁵⁰⁹ Grootboom and Others, *supra* note 444, para. 30. Emphasis in original.

⁵¹⁰ Grootboom and Others, *supra* note 444, para. 30.

⁵¹¹ Grootboom and Others, *supra* note 444, para. 30.

⁵¹² Grootboom and Others, *supra* note 444, para. 31.

⁵¹³ CONST. S. AFR., 1996, § 26(1).

⁵¹⁴ Grootboom and Others, *supra* note 444, para. 33.

⁵¹⁵ Grootboom and Others, *supra* note 444, para. 33.

Yacoob J then proceeded to “consider the meaning and scope of section 26 in its context.”⁵¹⁶ The learned justice began the analysis by noting that subsections (1) and (2) of § 26 “are related and must be read together,”⁵¹⁷ and that the right “delineated in section 26(1) is a right of ‘access to adequate housing’ as distinct from the right to adequate housing encapsulated in the Covenant.”⁵¹⁸ This, the learned justice noted, is an important difference. In order for an individual to fully exercise the right of access to adequate housing, Yacoob J noted, land must be available, “appropriate services such as the provision of water and the removal of sewage and the financing of all these, including the building of the house itself.”⁵¹⁹

Thus, argued the learned justice, in order for a person “to have access to adequate housing, . . . there must be land, there must be services, there must be a dwelling” and hence,

[a] right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.”⁵²⁰

Within South African society, for those individuals who are financially able to purchase houses, argued Yacoob J, the “state’s primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance.”⁵²¹ However, with respect to the poor, that is, those who cannot afford or have the financial

⁵¹⁶ Grootboom and Others, *supra* note 444, para. 34.

⁵¹⁷ Grootboom and Others, *supra* note 444, para. 34.

⁵¹⁸ Grootboom and Others, *supra* note 444, para. 35.

⁵¹⁹ Grootboom and Others, *supra* note 444, para. 35.

⁵²⁰ Grootboom and Others, *supra* note 444, para. 35.

⁵²¹ Grootboom and Others, *supra* note 444, para. 36.

resources to purchase houses, the state needs to pay special attention to them.⁵²² The learned justice went on to state that “[i]t is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent.”⁵²³ While § 26(2) “speaks to the positive obligation imposed upon the state,”⁵²⁴ it makes clear that “the obligation imposed upon the state is not an absolute or unqualified one.”⁵²⁵ Three important or key elements define or qualify the state’s obligation: “(a) the obligation to ‘take reasonable legislative and other measures’; (b) ‘to achieve the progressive realization’ of the right; and (c) ‘within available resources.’”⁵²⁶

Yacoob J makes note of the fact that South Africa’s is a federal governmental system, consisting of federal/national, provincial and local government spheres. As a consequence, “[a] reasonable [legislative] program” designed “to achieve the progressive realization” of an ESC right “must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.”⁵²⁷ Hence, the learned justice continued, “a co-ordinated state housing program must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution.”⁵²⁸ While each sphere of government “must accept responsibility for the implementation of particular parts of the program,” Yacoob J argues, however, that the national government “must assume responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the state’s section 26 obligations.”⁵²⁹

Since the state is required by law “to take reasonable legislative and other measures” to meet the “positive obligations imposed on it

⁵²² Grootboom and Others, *supra* note 444, para. 36.

⁵²³ Grootboom and Others, *supra* note 444, para. 37.

⁵²⁴ Grootboom and Others, *supra* note 444, para. 38.

⁵²⁵ Grootboom and Others, *supra* note 444, para. 38.

⁵²⁶ Grootboom and Others, *supra* note 444, para. 38.

⁵²⁷ Grootboom and Others, *supra* note 444, paras. 38 and 39.

⁵²⁸ Grootboom and Others, *supra* note 444, para. 40. Chapter 3 of the Constitution sets the modalities for cooperation between the various spheres of government—national, provincial and local. *See* CONST. S. AFR., 1996, Chapter 3.

⁵²⁹ Grootboom and Others, *supra* note 444, para. 40.

by section 26(2),” argues Yacoob J, “the question will be whether the legislative and other measures taken by the state are reasonable.”⁵³⁰ In addition to legislative measures, noted Yacoob J, the state must also design and implement “well-directed policies,” which themselves must be implemented reasonably.⁵³¹ The learned justice then goes on to argue that in order to determine if a program designed to realize the state’s obligations under § 26(2) is reasonable, it is necessary “to consider housing problems [in South Africa] in their social, economic and historical context,” as well as “the capacity of institutions responsible for implementing the program.”⁵³² In addition, argues the learned justice, “[a] program that excludes a significant segment of society cannot be said to be reasonable” and most importantly, “[r]easonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs.”⁵³³

Yacoob J argues that the obligation imposed on the state by § 26(2) involves the “progressive realization” of the right spelled out in § 26(1)—that is, “the right to have access to adequate housing.”⁵³⁴ Read together, the two sections indicate that the “right could not be realized immediately.”⁵³⁵ The phrase “progressive realization,” states Yacoob J, “is taken from international law and Article 2.1 of the [International Covenant on Economic, Social and Cultural Rights] in particular.”⁵³⁶

⁵³⁰ Grootboom and Others, *supra* note 444, paras. 41 and 42. Emphasis in original.

⁵³¹ Grootboom and Others, *supra* note 444, para. 342.

⁵³² Grootboom and Others, *supra* note 444, para. 43.

⁵³³ Grootboom and Others, *supra* note 444, para. 44.

⁵³⁴ Grootboom and Others, *supra* note 444, para. 45. *See also* CONST. S. AFR., 1996, §§ 26(1) & 26(2).

⁵³⁵ Grootboom and Others, *supra* note 444, para. 45.

⁵³⁶ Grootboom and Others, *supra* note 444, para. 45. Article 2(1) of the International Covenant on Economic, Social and Cultural Rights states as follows: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” *See* International

Yacoob J then goes on to argue that the CESCR has analyzed the requirement of progressive realization of ESC rights and made the following comment:

Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.⁵³⁷

CESCR General Comment No. 3 was designed to explain and elaborate States Parties' obligations under the ICESCR. Nevertheless, argues Yacoob J, the CESCR's analysis

is also helpful in plumbing the meaning of 'progressive realization' in the context of [the South African] Constitution. The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in [the South African] Constitution and there is no

Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (Dec. 16, 1996), art. 2(1).

⁵³⁷ Office of the High Commissioner for Human Rights, *CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, Doc. E/1991/23 (Dec. 14, 1990), para. 9.

reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.⁵³⁸

Yacoob J then next examines the phrase “within its available resources”⁵³⁹ and concludes that the obligation on the South African state contained in § 26(2) of the Constitution of South Africa “does not require the state to do more than its available resources permit.”⁵⁴⁰ This implies, argues Yacoob J, that “both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.”⁵⁴¹ This reasoning is in line with the Constitutional Court’s decision in *Soobramoney*,⁵⁴² where Chaskalson P said that:

What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.⁵⁴³

The Constitutional Court’s jurisprudence on the realization of “the right to have access to adequate housing” points to “a balance between goal and means.”⁵⁴⁴ As argued by Yacoob J, “[t]he measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what

⁵³⁸ Grootboom and Others, *supra* note 444, para. 45.

⁵³⁹ CONST. REP. S. AFRICA, § 26(2).

⁵⁴⁰ Grootboom and Others, *supra* note 444, para. 46.

⁵⁴¹ Grootboom and Others, *supra* note 444, para. 46.

⁵⁴² *Soobramoney*, *supra* note 494.

⁵⁴³ *Soobramoney*, *supra* note 494, para. 11.

⁵⁴⁴ Grootboom and Others, *supra* note 444, para. 46.

is reasonable.”⁵⁴⁵ The learned justice then went on to examine the “fragmented housing arrangements”⁵⁴⁶ that the state inherited from the apartheid regime in 1994, as well as the system as it existed at the time that *Grootboom and Others* was decided, including the roles played by each of the three governmental spheres.⁵⁴⁷

Yacoob J then made reference to the definition of “housing development” and “housing development project” as provided in § 1 of the Housing Act.⁵⁴⁸ The Housing Act sets out, in § 2(1) “the general principles binding on national, provincial and local spheres of government.”⁵⁴⁹ In addition, the Housing Act also “sets out the functions of the national, provincial and local government in relation to housing.”⁵⁵⁰ Part of the task before the Constitutional Court in this case was “to decide whether the nationwide housing program is sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements.”⁵⁵¹

Yacoob J then returned to § 28(1)(c) of the Constitution and noted that the High Court’s judgment amounted to:

- (a) section 28(1)(c) obliges the state to provide rudimentary shelter to children and their parents on demand if parents are unable to shelter their children;
- (b) this obligation exists independently of and in addition to the obligation to take reasonable legislative and other measures in terms of section 26; and (c) the state is bound to provide this rudimentary shelter irrespective of the availability of resources. On this

⁵⁴⁵ *Grootboom and Others*, *supra* note 444, para. 46.

⁵⁴⁶ *Grootboom and Others*, *supra* note 444, para. 47. This case was decided by the Constitutional Court on Oct. 4, 2000.

⁵⁴⁷ *Grootboom and Others*, *supra* note 444, paras. 47–50.

⁵⁴⁸ Government of South Africa, NO. 107 OF 1997: HOUSING ACT, 1997, <https://www.gov.za/documents/housing-act> (Nov. 6, 2019), § 1(vi–vii).

⁵⁴⁹ *Grootboom and Others*, *supra* note 444, para. 49. *See also* HOUSING ACT, 1997, § 2(1).

⁵⁵⁰ *Grootboom and Others*, *supra* note 444, para. 50. The functions of the three governmental spheres are set out in §§ 3, 7 & 9.

⁵⁵¹ *Grootboom and Others*, *supra* note 444, para. 55.

reasoning, parents with their children have two distinct rights: the right of access to adequate housing in terms of section 26 as well as a right to claim shelter on demand in terms of section 28(1)(c).⁵⁵²

The learned justice then noted that “[t]his reasoning produces an anomalous result. People who have children have a direct and enforceable right to housing under section 29(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be.”⁵⁵³

Most importantly, argues Yacoob J,

[t]he carefully constructed constitutional scheme for progressive realization of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand. Moreover, there is an obvious danger. Children could become stepping stones to housing their parents instead of being valued for who they are.⁵⁵⁴

Noting that there is “an evident overlap between the rights created by sections 26 and 27 and those conferred on children by section 28,” Yacoob J argues, however, that “[t]his overlap is not consistent with the notion that section 28(1)(c) creates separate and independent rights for children and their parents.”⁵⁵⁵

Yacoob J returns to international law and states that “[t]he extent of the state obligation must also be interpreted in the light of the international obligations binding upon South Africa.”⁵⁵⁶ The learned justice considered the UN Convention on the Rights of the

⁵⁵² Grootboom and Others, *supra* note 444, para. 70.

⁵⁵³ Grootboom and Others, *supra* note 444, para. 71.

⁵⁵⁴ Grootboom and Others, *supra* note 444, para. 71.

⁵⁵⁵ *Grootboom and Others*, *supra* note 444, para. 74.

⁵⁵⁶ Grootboom and Others, *supra* note 444, para. 75.

Child (“CRC”), which was ratified by South Africa in 1995.⁵⁵⁷ The CRC imposes an obligation on States Parties to make certain that the rights of children within their countries are respected and properly protected. According to Article 2(1),

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.⁵⁵⁸

According to Yacoob J, § 28 of the South African Constitution “is one of the mechanisms to meet these obligations” which are binding on the state.⁵⁵⁹ This section obligates the state “to take steps to ensure that children’s rights are observed” and the state does so

by ensuring that there are legal obligations to compel parents to fulfil their responsibilities in relation to their children. Hence, legislation and the common law impose obligations upon parents to care for their children. The state reinforces the observance of these obligations by the use of the civil and criminal law as well as social welfare programs.⁵⁶⁰

Section 28(1)(c) of the Constitution of South Africa, argues Yacoob J, “must be read in this context.”⁵⁶¹ According to subsections 28(1)(b) and (c):

Every child has the right—

⁵⁵⁷ *Convention on the Rights of the Child*, 1577 U.N.T.S. 3 (Nov. 20, 1999).

⁵⁵⁸ *Convention on the Rights of the Child*, *supra* note 557, art. 2(1).

⁵⁵⁹ Grootboom and Others, *supra* note 444, para. 75.

⁵⁶⁰ Grootboom and Others, *supra* note 444, para. 75.

⁵⁶¹ Grootboom and Others, *supra* note 444, para. 76.

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services.⁵⁶²

Yacoob J states that these two subsections:

must be read together. They ensure that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care. The section encapsulates the conception of the scope of care that children should receive in our society. Subsection (1)(b) defines those responsible for giving care while subsection (1)(c) lists various aspects of the care entitlement.⁵⁶³

The state, for example, must provide needed shelter to children who have been removed from their parents.⁵⁶⁴ Hence, argues Yacoob J, § 28(1)(c) “does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families.”⁵⁶⁵

Despite this conclusion, Yacoob J argues that “[t]his does not mean, however, that the state incurs no obligation in relation to children who are being cared for by their parents or families.”⁵⁶⁶ First, “the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28.”⁵⁶⁷ Second, “the state is required to fulfil its obligations to provide families with access to land in terms of section 25, access to adequate housing in terms of section 26 as well as

⁵⁶² CONST. REP. S. AFRICA, § 28(1)(c).

⁵⁶³ Grootboom and Others, *supra* note 444, para. 76.

⁵⁶⁴ Grootboom and Others, *supra* note 444, para. 77.

⁵⁶⁵ Grootboom and Others, *supra* note 444, para. 77.

⁵⁶⁶ Grootboom and Others, *supra* note 444, para. 78.

⁵⁶⁷ Grootboom and Others, *supra* note 444, para. 78.

access to health care, food, water and social security in terms of section 27.”⁵⁶⁸

The Constitutional Court’s judgment was that “sections 25 and 27 require the state to provide access on a programmatic and coordinated basis, subject to available resources. One of the ways in which the state would meet section 27 obligations would be through a social welfare program providing maintenance grants and other material assistance to families in need in defined circumstances.”⁵⁶⁹ Nevertheless, noted Yacoob J, “[i]t was not contended that the children who are respondents in this case should be provided with shelter apart from their parents.”⁵⁷⁰ The learned justice then went on to state that “[a]ll levels of government must ensure that the housing program is reasonably and appropriately implemented in the light of all the provisions in the Constitution.”⁵⁷¹ In addition, “[a]ll implementation mechanisms, and all state action in relation to housing falls to be assessed against the requirements of section 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.”⁵⁷²

However, noted Yacoob J, § 26 must be “read in the context of the Bill of Rights as a whole”⁵⁷³ and the evaluation of the reasonableness of state action must consider the “inherent dignity of human beings.”⁵⁷⁴ The learned justice then proceeded to allow the appeal in part, set aside the order of the Cape of Good Hope High Court and replace it with another, which included the following:

⁵⁶⁸ Grootboom and Others, *supra* note 444, para. 78. Section 25 defines, inter alia, the rights to property and the conditions under which one may be deprived of his or her property. Section 26 defines the right to have access to adequate housing, and section 27 defines the right to have access to health care, food, water and social security. *See* CONST. REP. S. AFRICA, §§ 25, 26 & 27.

⁵⁶⁹ Grootboom and Others, *supra* note 444, para. 78.

⁵⁷⁰ Grootboom and Others, *supra* note 444, para. 79.

⁵⁷¹ Grootboom and Others, *supra* note 444, para. 82.

⁵⁷² Grootboom and Others, *supra* note 444, para. 82.

⁵⁷³ Grootboom and Others, *supra* note 444, para. 83.

⁵⁷⁴ Grootboom and Others, *supra* note 444, para. 83.

It is declared that:

(a) Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated program progressively to realize the right of access to adequate housing.

(b) The program must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Program, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

(c) As at the date of the launch of this application, the state housing program in the area of the Cape Metropolitan Council fell short of compliance with the requirements in paragraph (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.⁵⁷⁵

In reaching its decision in this case involving economic, social and cultural rights (specifically, the right to have access to adequate housing), the Constitutional Court utilized international law as a tool of interpretation. First, Yacoob J cited to *Soobramoney*, a case decided by the Constitutional Court in 1997. In this case, Chaskalson P described the context in which the Bill of Rights must be interpreted and made note of what he believed lay at the heart of the country's new constitutional order—human dignity, freedom, and equality.⁵⁷⁶ Then Yacoob J cited to another one of Chaskalson P's decisions, that in *Makwanyane*, where the Chief Justice and President of the Constitutional Court, held that “[i]nternational agreements and

⁵⁷⁵ Grootboom and Others, *supra* note 444, para. 99.

⁵⁷⁶ *Soobramoney*, *supra* note 494, para. 8.

customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood.”⁵⁷⁷

Yacoob J then discussed differences between relevant provisions of the ICESCR and the South African Constitution and showed how provisions of the ICESCR could be used as a guide to the interpretation of § 26 of the Constitution, especially as they relate to the right to have access to adequate housing. Yacoob J also made generous use of the general comments of the UN Committee on Economic, Social and Cultural Rights, especially as they relate to the obligations of each State Party to ensure the realization of the ESC rights. After noting that the “[m]inimum core obligation [of each State Party] is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question,” Yacoob J then concluded that “[i]t is in this context that the concept of minimum core obligation must be understood in international law.”⁵⁷⁸

Yacoob J made specific use of the UN Committee on Economic, Social and Cultural Rights’ (“CESCR”) General Comment No. 3 to help interpret expressions, such as, “progressive realization” and “within its available resources” in South Africa’s Bill of Rights. After using the general comments of the CESCR to interpret various terms and expressions in § 26, Yacoob J noted that “[t]he extent of the state obligation must also be interpreted in the light of the international obligations binding upon South Africa.”⁵⁷⁹ Yacoob J also made reference to the UN Convention on the Rights of the Child (“CRC”) and noted that the CRC, which was ratified by South Africa in 1995, imposes an obligation on South Africa to ensure that children’s rights within the country are respected and properly and fully protected.⁵⁸⁰ Thus, in making their decision in *Grootboom and Others*, the

⁵⁷⁷ Makwanyane, *supra* note 123, para. 35. Note that *Makwanyane* was decided in 1995 and hence, was decided under the Interim Constitution (Act 200 of 1993). In this Constitution, Chapter 3 is “Fundamental Rights.” The Interim Constitution was repealed by the Constitution of the Republic of South Africa (No. 108 of 1996), which replaced “Fundamental Rights” with the “Bill of Rights” (Chapter 2).

⁵⁷⁸ *Grootboom and Others*, *supra* note 444, para. 31.

⁵⁷⁹ *Grootboom and Others*, *supra* note 444, para. 75.

⁵⁸⁰ *Grootboom and Others*, *supra* note 444, para. 75.

Constitutional Court made use of international law as an interpretive tool.

C. Minister of Health and Others v. Treatment Action Campaign and Others (Constitutional Court of South Africa)

This case was an appeal to the Constitutional Court (“CC”) in which the appellants were praying for a reversal of “orders made in a high court against government because of perceived shortcomings in its response to an aspect of the HIV/AIDS challenge.”⁵⁸¹ More specifically, the High Court’s finding was that the “government had acted unreasonably in (a) refusing to make an antiretroviral drug called nevirapine available in the public health sector where the attending doctor considered it medically indicated and (b) not setting out a timeframe for a national program to prevent mother-to-child transmission of HIV.”⁵⁸²

The original applicants in this case were several associations and members of civil society who were concerned with the treatment of HIV/AIDS and with the prevention of new infections. Of these, the principal actor was the Treatment Action Campaign (“TAC”).⁵⁸³ As part of its response to the HIV/AIDS pandemic, the Government of South Africa designed a program to specifically address “mother-to-child transmission of HIV at birth and identified nevirapine as its drug of choice for this purpose.”⁵⁸⁴ The government’s program, however, imposed “restrictions on the availability of nevirapine in the public health sector.”⁵⁸⁵ In the High Court case, the applicants “contended that these restrictions are unreasonable when measured

⁵⁸¹ Minister of Health and Others v. Treatment Action Campaign and Others (No. 2), [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033 (July 5, 2002), para. 2. The appellants were the South African Minister of Health and Members of the Executive Council for Health of the Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Mpumalanga, Northern Cape, Northern Province, and the North West.

⁵⁸² Treatment Action Campaign and Others, *supra* note 581, at para. 2.

⁵⁸³ Treatment Action Campaign and Others, *supra* note 581, at para. 3. In the appeals case to the Constitutional Court, these *applicants* were the *respondents*.

⁵⁸⁴ Treatment Action Campaign and Others, *supra* note 581, at para. 4.

⁵⁸⁵ Treatment Action Campaign and Others, *supra* note 581, at para. 4.

against the Constitution, which commands the state and all its organs to give effect to the rights guaranteed by the Bill of Rights.”⁵⁸⁶

At issue in this case are the rights guaranteed by §§ 27(1) and 28(1) of the Constitution, which are part of the Bill of Rights. According to § 27(1–2), “[e]veryone has the right to have access to— (a) health care services, including reproductive health care; (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.”⁵⁸⁷ Section 28(1) provides as follows: “Every child has the right—(c) to basic nutrition, shelter, basic health care services and social services.”⁵⁸⁸

The second issue in this case also arose out of the provisions of §§ 27 & 28 and concerns whether the “government is constitutionally obliged and had to be ordered forthwith to plan and implement an effective, comprehensive and progressive program for the prevention of mother-to-child transmission of HIV throughout the country.”⁵⁸⁹

As part of the background to the appeal, the Constitutional Court (“CC”) noted that the “two principal issues” before the CC “had been in contention between the applicants and the government for some considerable time prior to the launching of the application before the High Court.”⁵⁹⁰ In September 1999, when applicant, Treatment Action Campaign (“TAC”), “pressed for acceleration of the government program for the prevention of intrapartum mother-to-

⁵⁸⁶ Treatment Action Campaign and Others, *supra* note 581, at para. 4. The duty in question is provided for in §§ 7(2) and 8(1) of the Constitution. According to § 7(2), “[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights.” Section 8(1) provides as follows: “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.” See CONST. REP. S. AFRICA, §§ 7(2) & 8(1).

⁵⁸⁷ CONST. REP. S. AFRICA, § 27(1–2).

⁵⁸⁸ CONST. REP. S. AFRICA, § 28(1).

⁵⁸⁹ Treatment Action Campaign and Others, *supra* note 581, at para. 5.

⁵⁹⁰ Treatment Action Campaign and Others, *supra* note 581, at para. 10. The applicants included the Treatment Action Campaign, Dr. Haroon Saloojee, Children’s Rights Center, Institute for Democracy in South Africa and Community Law Center. See *Treatment Action Campaign and Others*, *supra* note 581, at para. 0.

child transmission of HIV,” TAC and the other concerned parties were “told by the Minister that this could not be done because there were concerns about, among other things, the safety and efficacy of nevirapine.”⁵⁹¹

In August 2000, nearly a year after the Minister of Health’s proclamation about “safety and efficacy of nevirapine,”⁵⁹² and “following the [thirteenth] International AIDS Conference in Durban [South Africa] [as well as] a follow-up meeting attended by the Minister and the MECs, the Minister announced that nevirapine would still not be made generally available. Instead, each province was going to select two sites for further research and the use of the drug would be confined to such sites.”⁵⁹³ In a letter dated July 17, 2001 and written by their attorney, the applicants:

placed on record that “[t]he Government has decided to make NVP [nevirapine] available only at a limited number of pilot sites, which number two per province.”

The result is that doctors in the public sector, who do not work at one of those pilot sites, are unable to prescribe this drug for their patients, even though it has been offered to the government for free.⁵⁹⁴

The applicants then asked the Minister to:

(a) provide us with legally valid reasons why you will not make NVP available to patients in the public health sector, except at the designated pilot sites, or alternatively to undertake forthwith to make NVP available in the public health sector.

⁵⁹¹ Treatment Action Campaign and Others, *supra* note 581, at para. 10.

⁵⁹² Treatment Action Campaign and Others, *supra* note 581, at para. 10.

⁵⁹³ Treatment Action Campaign and Others, *supra* note 581, at para. 10. The “MECs” are “the respective members of the executive councils (MECs) responsible for health in all provinces.” *See id.*

⁵⁹⁴ Treatment Action Campaign and Others, *supra* note 581, at para. 11.

(b) undertake to put in place a program which will enable all medical practitioners in the public sector to decide whether to prescribe NVP for their pregnant patients, and to prescribe it where in their professional opinion this is medically indicated.⁵⁹⁵

In a reply dated August 6, 2001, the Minister of Health “did not deny the restrictions imposed on the government on the availability of nevirapine” and indicated that there was no specific plan to extend the availability of nevirapine.⁵⁹⁶ The CC noted that the “meaning of the Minister’s letter is, however, quite unmistakable. It details a series of governmental concerns regarding the safety and efficacy of nevirapine requiring continuation of government’s research program.”⁵⁹⁷

The CC noted that,

in January 2001 the World Health Organization [had] recommended the administration of [nevirapine] to mother and infant at the time of birth in order to combat HIV and between November 2000 and April 2001[,] the Medicines Control Council settled the wording of the package insert dealing with such use. The insert was formally approved by the Council in April 2001 and the parties treated that as the date of approval of the drug for the prevention of mother-to-child transmission of HIV.⁵⁹⁸

The Minister, the CC noted further, “quite clearly intimated that . . . [t]he decision was to confine the provision of nevirapine in the public sector to the research sites and their outlets.”⁵⁹⁹

The CC noted, however, that “[t]he crux of the problem [was]: what is to happen to those mothers and their babies who cannot afford

⁵⁹⁵ Treatment Action Campaign and Others, *supra* note 581, at para. 11.

⁵⁹⁶ Treatment Action Campaign and Others, *supra* note 581, at para. 11.

⁵⁹⁷ Treatment Action Campaign and Others, *supra* note 581, at para. 11.

⁵⁹⁸ Treatment Action Campaign and Others, *supra* note 581, at para. 11.

⁵⁹⁹ Treatment Action Campaign and Others, *supra* note 581, at para. 14.

access to private health care and do not have access to the research and training sites?”⁶⁰⁰ At the time the appeal came before the CC, there was no clear indication on when the government would make the medicine—nevirapine—available outside the research and training sites.⁶⁰¹ The CC went on to note that it was quite clear from the materials presented to the Court by the government that nevirapine was not likely to be made available at “any public health institution other than one designated as part of a research site.”⁶⁰²

The two principal issues before the Constitutional Court were, as stated in paragraphs 20 and 21 of the affidavit of the TAC:

20. The first issue is whether the Respondents are entitled to refuse to make Nevirapine (a registered drug) available to pregnant women who have HIV and who give birth in the public health sector, in order to prevent or reduce the risk of transmission of HIV to their infants, where in the judgment of the attending medical practitioner this is medically indicated.

21. The second issue is whether the Respondents are obliged, as a matter of law, to implement and set out clear timeframes for a national program to prevent mother-to-child transmission of HIV, including voluntary counselling and testing, antiretroviral therapy, and the option of using formula milk for feeding.⁶⁰³

The CC then moved on to provide an overview of the enforcement of socio-economic rights in South Africa. The Court

⁶⁰⁰ Treatment Action Campaign and Others, *supra* note 581, at para. 17.

⁶⁰¹ Treatment Action Campaign and Others, *supra* note 581, at para. 17.

⁶⁰² Treatment Action Campaign and Others, *supra* note 581, at para. 17.

⁶⁰³ Treatment Action Campaign and Others, *supra* note 581, at para. 18.

Note that in the appeals case before the Constitutional Court, the applicants, who include the Treatment Action Campaign (“TAC”), are the “respondents,” while the “appellants” are the Minister of Health and the MECs. *See id.* at para. 0. Paragraph 22 of the respondents/applicants’ affidavit summarizes the applicants’ case. That summary can be found in paragraph 19 of Treatment Action Campaign and Others, *supra* note 581. *See id.*

noted that it had had to “consider claims for enforcement of socio-economic rights on two occasions” and that “[o]n both occasions it was recognized that the state is under a constitutional duty to comply with the positive obligations imposed on it by sections 26 and 27 of the Constitution.”⁶⁰⁴ The Court, noted, however, that “the obligations are subject to the qualifications expressed in sections 26(2) and 27(2).”⁶⁰⁵ With respect to the first opportunity that the CC had to rule on a claim for the enforcement of socio-economic rights, in *Soobramoney* “the claim was dismissed because the applicant failed to establish that the state was in breach of its obligations under section 26 in so far as the provision of renal analysis to chronically ill patients was concerned.”⁶⁰⁶

In *Grootboom*,⁶⁰⁷ the CC had a second opportunity to rule on a claim for the socio-economic rights. In that case, the Court upheld the claim “because the state’s housing policy in the area of the Cape Metropolitan Council failed to make reasonable provision within available resources for people in that area who had no access to land and no roof over their heads and were living in intolerable conditions.”⁶⁰⁸

With respect to *Treatment Action Campaign and Others*, the Court noted that the question before it was not “whether socio-economic rights are justiciable,” but “whether the applicants have shown that the measures adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies fall short of its obligations under the Constitution.”⁶⁰⁹ Before proceeding to examine the applicants’ legal submissions, the Court considered “a line of argument presented on behalf of the first and second amici,” which “contended that section 27(1) of the Constitution establishes *an*

⁶⁰⁴ Treatment Action Campaign and Others, *supra* note 581, at para. 23.

⁶⁰⁵ Treatment Action Campaign and Others, *supra* note 581, at para. 23.

⁶⁰⁶ Treatment Action Campaign and Others, *supra* note 581, at para. 23. *See also* Soobramoney v. Minister of Health (KwaZulu-Natal), [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (Nov. 27, 1997).

⁶⁰⁷ Government of the Republic of South Africa and Others v. Grootboom and Others, [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (Oct. 4, 2000).

⁶⁰⁸ Treatment Action Campaign and Others, *supra* note 581, at para. 23.

⁶⁰⁹ Treatment Action Campaign and Others, *supra* note 581, at para. 25.

individual right vested in everyone.”⁶¹⁰ It was further contended that the right mentioned above has “a minimum core to which every person in need is entitled.”⁶¹¹

The Court then noted that “the concept of ‘minimum core’ was developed by the United Nations Committee on Economic, Social and Cultural Rights [“CESCR”] which is charged with monitoring the obligations undertaken by [State Parties] to the International Covenant on Economic, Social and Cultural Rights.”⁶¹² For example, the CESCR, in its General Comment No. 3, which deals with the nature of States Parties’ obligations, states that:

[o]n the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States Parties’ reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party.⁶¹³

According to the Court, “[s]upport for this contention was sought in the language of the Constitution and attention was drawn to the differences between sections 9(2), 24(b), 25(5) and 25(8) on the one hand, and sections 26 and 27 on the other.”⁶¹⁴ After examining the differences between the two sets of constitutional provisions, the Court stated that, although the minimum core in these provisions may be difficult to define, it, nevertheless, “includes at least the minimum decencies of life consistent with human dignity.”⁶¹⁵ In addition, argued the Court, “[n]o one should be condemned to a life below the basic level of dignified human existence. The very notion of individual rights

⁶¹⁰ Treatment Action Campaign and Others, *supra* note 581, at para. 26. Emphasis added.

⁶¹¹ Treatment Action Campaign and Others, *supra* note 581, at para. 26.

⁶¹² Treatment Action Campaign and Others, *supra* note 581, at para. 26.

⁶¹³ Office of the High Commissioner for Human Rights, *CESCR General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the ICESCR)*, Doc. E/1991/23 (Dec. 14, 1990), para. 10.

⁶¹⁴ Treatment Action Campaign and Others, *supra* note 581, at para. 27. Footnotes omitted.

⁶¹⁵ Treatment Action Campaign and Others, *supra* note 581, at para. 28.

presupposes that anyone in that position should be able to obtain relief from a court.”⁶¹⁶

The main issue in this case comes down to how South African courts have interpreted “subsections (1) and (2) of both section 26 and 27” and how these subsections are “linked in the text of the Constitution.”⁶¹⁷ The Court noted that the issue of interpretation has been resolved by the Court in *Soobramoney*⁶¹⁸ and *Grootboom*.⁶¹⁹ In *Soobramoney*, Chaskalson P declared as follows:

What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, *and that the corresponding rights themselves are limited by reason of the lack of resources*.⁶²⁰

The Court in the present case—*Treatment Action Campaign and Others*—then noted that the obligations referred to in the above paragraph from *Soobramoney*, “are clearly the obligations referred to in sections 26(2) and 27(2) and the corresponding rights referred to in sections 26(1) and 27(1).”⁶²¹ In *Grootboom*, the Court made clear that §§ 26(1) and 26(2) “are closely related and must be read together.”⁶²² Yacoob J, writing for the Court in *Grootboom*, said:

The section has been carefully crafted. It contains three subsections. The first confers a general right of access to adequate housing. The second establishes and delimits the scope of the positive obligation imposed upon the state to promote access to adequate housing and has three key elements.⁶²³

⁶¹⁶ Treatment Action Campaign and Others, *supra* note 581, at para. 28.

⁶¹⁷ Treatment Action Campaign and Others, *supra* note 581, at para. 29.

⁶¹⁸ Soobramoney, *supra* note 494.

⁶¹⁹ Grootboom and Others, *supra* note 444.

⁶²⁰ Soobramoney, *supra* note 494, at para. 11.

⁶²¹ Treatment Action Campaign and Others, *supra* note 581, at para. 31.

⁶²² Grootboom and Others, *supra* note 444, at para. 34.

⁶²³ Grootboom and Others, *supra* note 444, at para. 21.

The *Grootboom* Court also declared that “[s]ection 26 does not expect more of the State than is achievable within its available resources.”⁶²⁴ In addition, § 26 does not confer on any individual an entitlement to “claim shelter or housing immediately upon demand.”⁶²⁵ “[A]s far as the rights of access to housing, health care, sufficient food and water, and social security for those unable to support themselves and their dependents are concerned,”⁶²⁶ the South African “State is not obliged to go beyond available resources or to realize these rights immediately.”⁶²⁷

In *Grootboom*, Yacoob J also made use of provisions of the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and held that in terms of the Constitution of the Republic of South Africa, the question that the Court needed to address was “whether the measures taken by the State to realize the right afforded by [section] 26 are reasonable.”⁶²⁸ The Court in the present case—*Treatment Action Campaign and Others*—then noted that:

[a]lthough Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing right conferred on everyone under section 26(1).⁶²⁹

The *Treatment Action Campaign and Others* Court then went on to state that “[i]t is impossible to give everyone access even to a ‘core’ service immediately. All that is possible, and all that can be expected

⁶²⁴ *Grootboom and Others*, *supra* note 444, at para. 46.

⁶²⁵ *Grootboom and Others*, *supra* note 444, at para. 95.

⁶²⁶ *Treatment Action Campaign and Others*, *supra* note 581, at para. 32.

⁶²⁷ *Grootboom and Others*, *supra* note 444, at para. 94.

⁶²⁸ *Grootboom and Others*, *supra* note 444, at para. 33.

⁶²⁹ *Treatment Action Campaign and Others*, *supra* note 581, at para. 34.

of the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.”⁶³⁰ The Court then concluded that:

... section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to “respect, protect, promote and fulfil” such rights. The rights conferred by sections 26(1) and 27(1) are to have “access” to the services that the state is obliged to provide in terms of sections 26(2) and 27(2).⁶³¹

Next, the Court provided an overview of government policy on the prevention of mother-to-child transmission of HIV.⁶³² In doing so, the Court noted that after the Thirteenth International Conference on HIV/AIDS that was held in Durban (South Africa) in July 2000, the government “took a decision to implement a program for the prevention of mother-to-child transmission of HIV/AIDS.”⁶³³ This new program, the Court noted, “entailed the provision of voluntary HIV counseling and testing to pregnant women, the provision of nevirapine and the offer of formula feed to HIV-positive mothers who chose this option of feeding.”⁶³⁴ Nevertheless, the implementation of this program was “to be confined to selected sites in each province for a period of two years” and used “primarily to evaluate the use of nevirapine, monitoring and evaluating its impact on the health status of the children affected as well as the feasibility of such an intervention on a countrywide basis.”⁶³⁵ It was stipulated that information gathered from these clinical trials would be used to develop a “national policy

⁶³⁰ Treatment Action Campaign and Others, *supra* note 581, at para. 35.

⁶³¹ Treatment Action Campaign and Others, *supra* note 581, at para. 39.

⁶³² Treatment Action Campaign and Others, *supra* note 581, at paras. 40–43.

⁶³³ Treatment Action Campaign and Others, *supra* note 581, at para. 41.

⁶³⁴ Treatment Action Campaign and Others, *supra* note 581, at para. 41.

⁶³⁵ Treatment Action Campaign and Others, *supra* note 581, at para. 41.

for the extension of this program to other public facilities outside the pilot sites.”⁶³⁶

The Court then proceeded to review the applicants’ case, which centered on their belief that:

the measures adopted by the government to provide access to health care services to HIV-positive pregnant women were deficient in two material respects: first, because they prohibited the administration of nevirapine at public hospitals and clinics outside the research and training sites; and second, because they failed to implement a comprehensive program for the prevention of mother-to-child transmission of HIV.⁶³⁷

In examining the applicants’ case, the Court noted that “[i]n deciding on the policy to confine nevirapine to the research and training sites, the cost of the drug itself was not a factor.”⁶³⁸ This, the Court argued, was made clear in an affidavit presented to the Court by Dr. Ntsaluba. According to Dr. Ntsaluba:

I admit that the medicine has been offered to the first to ninth respondents for free for a period of five years by the manufacturer. The driving cost for the provision of Nevirapine however is not the price to be attached to the medicine but the provision of the formula feeding for those persons who are not in a position to afford formula feeds in order to discourage breast feeding and other costs incurred to provide operational structures which are appropriately and properly geared toward counselling and testing persons who are candidates for the administration of Nevirapine.⁶³⁹

⁶³⁶ Treatment Action Campaign and Others, *supra* note 581, at para. 41.

⁶³⁷ Treatment Action Campaign and Others, *supra* note 581, at para. 44.

⁶³⁸ Treatment Action Campaign and Others, *supra* note 581, at para. 48.

⁶³⁹ Treatment Action Campaign and Others, *supra* note 581, at para. 48.

Note the “first to ninth respondents” are the Minister of Health and the eight MECs.

In addition, Dr. Ntsaluba also stated that:

[t]he public health sector hospitals, as it is, are under tremendous pressure, and while it may be ideal for such doctors to go on to provide Nevirapine with the appropriate advice, counselling and follow-up care, is presently not immediately attainable. It is imperative that appropriate support structures for counselling, follow-up etc. be put in place to ensure that Nevirapine is effective and that it delivers the promised benefits.⁶⁴⁰

With respect to the government's program on the provision of health care services to HIV-positive mothers, the Court concluded that "[t]he costs that are of concern to the government are therefore the costs of providing the infrastructure for counseling and testing, of providing formula feed, vitamins and an antibiotic drug and of monitoring, during bottle-feeding, the mothers and children who have received nevirapine."⁶⁴¹

Nevertheless, stated the Court, "[t]hese costs are relevant to the comprehensive program to be established at the research and training sites. They are not, however, relevant to the provision of a single dose of nevirapine to both mother and child at the time of birth."⁶⁴² The Court noted that the government had given four reasons for restricting the "administration of nevirapine to the research and training sites."⁶⁴³ First, the government complained about the "efficacy of nevirapine where the 'comprehensive package' is not available."⁶⁴⁴ Second, "there was a concern that the administration of nevirapine to the mother and her child might lead to the development of resistance to the efficacy of nevirapine and related antiretrovirals in later years."⁶⁴⁵ Third, nevirapine is considered "a potent drug and it is not known

⁶⁴⁰ Treatment Action Campaign and Others, *supra* note 581, at para. 48.

⁶⁴¹ Treatment Action Campaign and Others, *supra* note 581, at para. 49.

⁶⁴² Treatment Action Campaign and Others, *supra* note 581, at para. 50.

⁶⁴³ Treatment Action Campaign and Others, *supra* note 581, at para. 51.

⁶⁴⁴ Treatment Action Campaign and Others, *supra* note 581, at para. 51.

⁶⁴⁵ Treatment Action Campaign and Others, *supra* note 581, at para. 51.

what hazards may attach to its use.”⁶⁴⁶ Finally, there was the issue of resource scarcity. The Court noted that:

[i]t was contended on behalf of government that nevirapine should be administered only with the ‘full package’ and that it was not reasonably possible to do this on a comprehensive basis because of the lack of trained counsellors and counselling facilities and also budgetary constraints which precluded such a comprehensive scheme being implemented.⁶⁴⁷

The Court then proceeded to examine the issues raised by the government regarding the use of nevirapine. After examining the issue of nevirapine’s efficacy, the Court held that “the wealth of scientific material produced by both sides makes plain that sero-conversion of HIV takes place in some, but not all, cases and that nevirapine thus remains to some extent efficacious in combating mother-to-child transmission even if the mother breastfeeds her baby.”⁶⁴⁸ With respect to resistance, the Court noted that “[a]lthough resistant strains of HIV might exist after a single dose of nevirapine, this situation is likely to be transient.”⁶⁴⁹

Regarding the safety of nevirapine, the Court noted that

[t]he only evidence of potential harm concerns risks attaching to the administration of nevirapine as a chronic medication on an ongoing basis for the treatment of HIV-positive persons. There is, however, no evidence to suggest that a dose of nevirapine to both mother and child at the time of birth will result in any harm to either of them.⁶⁵⁰

⁶⁴⁶ Treatment Action Campaign and Others, *supra* note 581, at para. 51.

⁶⁴⁷ Treatment Action Campaign and Others, *supra* note 581, at para. 54.

⁶⁴⁸ Treatment Action Campaign and Others, *supra* note 581, at para. 58.

⁶⁴⁹ Treatment Action Campaign and Others, *supra* note 581, at para. 59.

⁶⁵⁰ Treatment Action Campaign and Others, *supra* note 581, at para. 60.

The Court then noted that the World Health Organization has recommended the use of nevirapine, without qualification, for the treatment of HIV-positive persons⁶⁵¹ and the South African Medicines Control Council “registered nevirapine in 1998 (affirming its quality, safety and efficacy) and later expressly approved its administration to mother and infant at the time of birth in order to combat HIV.”⁶⁵²

With respect to capacity, the Court noted that:

[a]lthough the concerns raised by Dr. Simelela are relevant to the ability of government to make a ‘full package’ available throughout the public health sector, they are not relevant to the question whether nevirapine should be used to reduce mother-to-child transmission of HIV at those public hospitals and clinics outside the research sites where facilities in fact exist for testing and counselling.⁶⁵³

The Court then noted that:

[t]he policy of confining nevirapine to research and training sites fails to address the needs of mothers and their newborn children who do not have access to the sites. It fails to distinguish between the evaluation of programs for reducing mother-to-child transmission and the need to provide access to health care services required by those who do not have access to the sites.⁶⁵⁴

Next, the Court made reference to its decision in *Grootboom* regarding what it means for government policy or action to be *reasonable*. There, the Court held as follows:

To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right

⁶⁵¹ Treatment Action Campaign and Others, *supra* note 581, at para. 60.

⁶⁵² Treatment Action Campaign and Others, *supra* note 581, at para. 61.

⁶⁵³ Treatment Action Campaign and Others, *supra* note 581, at para. 66.

⁶⁵⁴ Treatment Action Campaign and Others, *supra* note 581, at para. 67.

they endeavor to realize. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realization of the right.⁶⁵⁵

The Court acknowledged that the research carried out at the government-designated research and training sites can inform public policy and enhance the ability of the government to develop and implement more effective programs to deal with mother-to-child transmission of HIV-AIDS. Nevertheless, the Court also noted that:

[t]his does not mean, however, that until the best program has been formulated and the necessary funds and infrastructure provided for the implementation of that program, nevirapine must be withheld from mothers and children who do not have access to the research and training sites. Nor can it reasonably be withheld until medical research has been completed.⁶⁵⁶

The Court concluded by making reference to Yacoob J's decision in *Grootboom*, where the learned justice stated that a program to realize socio-economic rights must "be balanced and flexible and make appropriate provision for attention to . . . crises and to short, medium, and long-term needs. A program that excludes a significant segment of society cannot be said to be reasonable."⁶⁵⁷

The Court also noted that in deciding this case, it was also important to consider the rights of children, specifically, new-born children. According to § 28(1)(b) and (c) of the South African Constitution,

[e]very child has the right—

(a) . . .

⁶⁵⁵ Treatment Action Campaign and Others, *supra* note 581, at para. 68.

⁶⁵⁶ Treatment Action Campaign and Others, *supra* note 581, at para. 68.

⁶⁵⁷ Grootboom, *supra* note 444, at para. 43.

(b) to family care or parental care, or to appropriate alternative care when

(c) to basic nutrition, shelter, basic health care services and social services.⁶⁵⁸

The Court then noted that the applicants, as well as, the amici curiae, “relied on these [constitutional] provisions to support the order made by the High Court.”⁶⁵⁹ The Court then proceeded to cite to Yacoob J’s holding in *Grootboom*, where the learned justice held that subsections (b) and (c) of § 28 (1) “must be read together.”⁶⁶⁰ Yacoob J then went on to note that § 28(1)(b) and § 28(1)(c):

ensure that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care. The section encapsulates the conception of the scope of care that children should receive in our society. Subsection (1)(b) defines those responsible for giving care while subsection (1)(c) lists various aspects of the care entitlement.

It follows from subsection 1(b) that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking.⁶⁶¹

Relying on these passages from the *Grootboom* judgment, the counsel for the government had argued before the Court that § 28(1)(c) imposes “an obligation on the parents of the newborn child, and not the state, to provide the child with the required basic health care services.”⁶⁶² The Court noted, however, that while the primary responsibility for providing basic health care services to children “rests on those parents who can afford to pay for such services, it was made

⁶⁵⁸ CONST. REP. S. AFRICA, § 28(1)(b) & (c).

⁶⁵⁹ Treatment Action Campaign and Others, *supra* note 581, at para. 74.

⁶⁶⁰ *Grootboom*, *supra* note 444, at para. 75.

⁶⁶¹ *Grootboom*, *supra* note 444, at para. 75.

⁶⁶² Treatment Action Campaign and Others, *supra* note 581, at para. 76.

clear in *Grootboom* that '[t]his does not mean . . . that the State incurs no obligation in relation to children who are being cared for by their parents or families.'"⁶⁶³

The Court then examined the jurisprudence of foreign jurisdictions, notably, the U.S. Supreme Court, the German Federal Constitutional Court, the Supreme Court of Canada, the House of Lords (UK), and the Supreme Court of India, on the question of remedies and noted that "courts in other countries also accept that it may be appropriate, depending on the circumstances of the particular case, to issue injunctive relief against the state."⁶⁶⁴

The Court then set aside the orders made by the High Court and replaced them with others, which included the following:

We accordingly make the following orders:

1. The orders made by the High Court are set aside and the following orders are substituted.

2. It is declared that:

a) Sections 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and coordinated program to realize progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.

b) The program to be realized progressively within available resources must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of

⁶⁶³ Treatment Action Campaign and Others, *supra* note 581, at para. 77. See also *Grootboom*, *supra* note 444, at para. 78.

⁶⁶⁴ Treatment Action Campaign and Others, *supra* note 581, at para. 107.

HIV, and making appropriate treatment available to them for such purposes.

c) The policy for reducing the risk of mother-to-child transmission of HIV as formulated and implemented by government fell short of compliance with the requirements in subparagraphs (a) and (b) in that:

i) Doctors at public hospitals and clinics other than the research and training sites were not enabled to prescribe nevirapine to reduce the risk of mother-to-child transmission of HIV even where it was medically indicated and adequate facilities existed for the testing and counselling of the pregnant women concerned.

ii) The policy failed to make provision for counsellors at hospitals and clinics other than at research and training sites to be trained in counselling for the use of nevirapine as a means of reducing the risk of mother-to-child transmission of HIV.

3. Government is ordered without delay to:

a) Remove the restrictions that prevent nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites.

b) Permit and facilitate the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics when in the judgment of the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned this is medically indicated, which shall if necessary

include that the mother concerned has been appropriately tested and counselled.

c) Make provision if necessary for counsellors based at public hospitals and clinics other than the research and training sites to be trained for the counselling necessary for the use of nevirapine to reduce the risk of mother-to-child transmission of HIV.

d) Take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.

4. The orders made in paragraph 3 do not preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV.

5. The government must pay the applicants' costs, including the costs of two counsel.

6. The application by government to adduce further evidence is refused.⁶⁶⁵

As was the case with its decision in *Grootboom*, the Constitutional Court utilized international law as a tool of interpretation. Specifically, the Court made reference to *Sobramoney* and *Grootboom*, cases in which the Constitutional Court had used international law to interpret various sections of the Constitution dealing with socio-economic rights, particularly §§ 26 and 27. The Court made specific reference to the General Comments of the UN Committee on Economic, Social and Cultural Rights ("CESCR"), which is empowered and charged with "monitoring the obligations

⁶⁶⁵ Treatment Action Campaign and Others, *supra* note 581, at para. 135.

undertaken by States Parties to the International Covenant on Economic, Social and Cultural Rights.”⁶⁶⁶ The Court looked specifically to the CESCR’s General Comment No. 3 in its efforts to deal with the issue of “minimum core.”⁶⁶⁷ Hence, in making their judgment in *Treatment Action Campaign and Others*, the justices of the Constitutional Court made use of international law as an interpretive tool.

IV. CONCLUSION AND POLICY RECOMMENDATIONS

Since the United Nations adopted the Universal Declaration of Human Rights in 1948, the international environment for the recognition and protection of human rights has improved significantly. The international community has adopted several treaties, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which impose obligations on each State Party to undertake:

to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in [the International Covenant on Civil and Political Rights], without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶⁶⁸

⁶⁶⁶ *Treatment Action Campaign and Others*, *supra* note 581, at para. 26.

⁶⁶⁷ Office of the High Commissioner for Human Rights, *CESCR General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the ICESCR)*, Doc. E/1991/23 (Dec. 14, 1990).

⁶⁶⁸ *International Covenant on Civil and Political Rights*, UNGA Res. 2200A(XXI) (Dec. 16, 1966), <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (Nov. 13, 2019).

In addition, international organizations,⁶⁶⁹ regional organizations,⁶⁷⁰ and national governments⁶⁷¹ have adopted various “procedures for protecting against and providing remedies for human rights abuses.”⁶⁷²

Human rights are considered “a domain of international law.”⁶⁷³ Since treaties⁶⁷⁴ and custom are the most important sources of international law, any study of international human rights must invariably involve an examination and understanding of treaties and their relationship to each country’s domestic laws.⁶⁷⁵ By far, one of the most important treaties of the modern era is the United Nations Charter, which established the United Nations.⁶⁷⁶ Since 1945, the international community has concluded, adopted, and ratified other treaties, particularly those dealing with human rights.⁶⁷⁷ The Universal Declaration of Human Rights, together with the International

⁶⁶⁹ For example, the United Nations, which has adopted such international human rights instruments as the *UN Convention on the Rights of the Child* and the *UN Convention on the Elimination of All Forms of Discrimination Against Women*.

⁶⁷⁰ For example, the Organization of African Unity/African Union, which has adopted the *African Charter on Human and Peoples’ Rights* and the *African Charter on the Rights and Welfare of the Child*.

⁶⁷¹ For example, since the early-1990s, many African countries have adopted new constitutions or amended their existing constitutions to include a Bill of Rights—the latter includes constitutional recognition of and protections for human rights. *See, e.g.*, Constitution of the Republic of South Africa, 1996 (No. 108 of 1996)—G17678, at Chapter 2.

⁶⁷² DAVID WEISSBRODT AND CONNIE DE LA VEGA, *INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION* 3 (2007).

⁶⁷³ WEISSBRODT & DE LA VEGA, *supra* note 672, at 4.

⁶⁷⁴ *See* WEISSBRODT, *supra* note 672, at 4.

⁶⁷⁵ WEISSBRODT & DE LA VEGA, *supra* note 672, at 4.

⁶⁷⁶ *See Charter of the United Nations*, 1 U.N.T.S. XVI (Oct. 24, 1945).

⁶⁷⁷ In addition to the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, the international community has also adopted and ratified other international human rights instruments, such as the *Convention on the Elimination of all Forms of Discrimination Against Women*; *International Convention on the Elimination of All Forms of Racial Discrimination*; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; *Convention on the Rights of the Child*; *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*; *International Convention for the Protection of All Persons from Enforced Disappearance*; and *Convention on the Rights of Persons with Disabilities*.

Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, are collectively referred to as the International Bill of Human Rights.⁶⁷⁸

Unfortunately, the international community does not have a government that has the capacity to enforce international human rights, that is, those guaranteed by the various international human rights instruments.⁶⁷⁹ International legal scholars have argued that national governments, that is the governments of States Parties to each international human rights instrument, can function as an effective mechanism for enforcing international human rights law. David Weissbrodt states that “[t]he most effective mechanism for enforcing international law is for each ratifying government to incorporate its treaties and customary obligations into national laws.”⁶⁸⁰

For example, the Constitution of the Republic of Kenya, 2010, provides that “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”⁶⁸¹ Earlier, this article examined the two approaches to the determination of how effect is given to international law instruments in each country. These are the monist and dualist approaches.⁶⁸² In countries, which follow the monist approach, international law and domestic law comprise one single legal order within the country’s legal system, but international law overrides any contrary domestic law.⁶⁸³ In a monist country, once an international treaty has been signed and ratified, it is no longer necessary for national legislators to domesticate the treaty and create rights that are justiciable in domestic courts.⁶⁸⁴

⁶⁷⁸ CHRISTOPHER N. J. ROBERTS, *THE CONTENTIOUS HISTORY OF THE INTERNATIONAL BILL OF HUMAN RIGHTS* ix (2015).

⁶⁷⁹ For example, the economic, social and cultural rights guaranteed by the International Covenant on Economic, Social and Cultural Rights.

⁶⁸⁰ WEISSBRODT & DE LA VEGA, *supra* note 672, at 4.

⁶⁸¹ CONST. REP. KENYA, 2010, art. 2(6).

⁶⁸² See, e.g., WEISSBRODT & DE LA VEGA, *supra* note 672, at 4. See also John Mukum Mbaku, *International Law and Limits on the Sovereignty of African States*, 30 FLA J. INT’L L. 43, 69 (2018).

⁶⁸³ Mbaku, *supra* note 682, at 69.

⁶⁸⁴ Mbaku, *supra* note 682, at 69.

In countries that follow the dualist approach, the legislature must domesticate provisions of international law in order to create rights that are justiciable in domestic courts. In dualist countries, international law and domestic law are considered separate and independent legal systems and for international law to create rights that are justiciable in domestic courts, national authorities must explicitly use legislation to incorporate the provisions of international law instruments into domestic law.⁶⁸⁵ It is important to note that international jurists and other international law experts consider *international norms* “that have attained the status of international customary law . . . to be part of municipal law under both the monist and dualist theories, and therefore prevail over national law even in domestic courts.”⁶⁸⁶

This article noted that “[a] State can, through its constitution, put to rest any doubts as to whether international law, including customary international law, is law within its jurisdiction.”⁶⁸⁷ South Africa’s post-apartheid constitution, for example, directly addresses the applicability of both international law and customary international law in the country’s domestic courts.⁶⁸⁸ Throughout the continent, however, some countries have been able to overcome the constraints that “nonincorporation [of treaties] would normally impose through their use of international human rights instruments as persuasive authority in national court decisions.”⁶⁸⁹

Courts in some African countries, such as Ghana, which has not explicitly made allowance in its constitution for the use of international law as some form of authority, have overcome the constraints imposed on them by adopting the “transjudicial model.”⁶⁹⁰ As explained by Adjami, “[t]he transjudicial model accounts for the actual use of international law and comparative case law in domestic courts, regardless of the binding or nonbinding status of their

⁶⁸⁵ See, e.g., John Laws, *Monism and Dualism*, 2 LA REVUE ADMINISTRATIVE 18 (2000) (examining, inter alia, monism and dualism in administrative law).

⁶⁸⁶ Adjami, *supra* note 28, at 109.

⁶⁸⁷ Mbaku, *supra* note 682, at 73.

⁶⁸⁸ CONST. REP. S. AFRICA, 1996, §§ 232–233.

⁶⁸⁹ Adjami, *supra* note 28, at 112.

⁶⁹⁰ Adjami, *supra* note 28, at 112.

sources.”⁶⁹¹ International law scholars have argued that transjudicialism has significantly improved dialogue across the world’s judicial system, as well as judicial comity.⁶⁹² This article then examined cases from several countries to determine the extent to which domestic courts have utilized international law and comparative law sources in their decisions generally and interpretation of national constitutions in particular. Specifically, the present article examined cases from Ghana, Botswana, Namibia, South Africa, and Tanzania. Through this process, it was determined that courts in many African countries are increasingly utilizing international law and comparative law as instruments to help them interpret their national constitutions, including their Bills of Rights. As declared by Archer CJ in *New Patriotic Party v. Inspector-General of Police* (Ghana), “I do not think that the fact that Ghana has not passed specific legislation to give effect to [the African Charter on Human and Peoples’ Rights], [means that] the Charter cannot be relied upon.”⁶⁹³

This article further makes reference to case law from South Africa to demonstrate how judges have been able to find creative ways to use international human rights instruments to interpret the Bill of Rights and significantly enhance the recognition and protection of human rights. In this section, emphasis is placed on economic, social and cultural rights, which are contained in both the International Covenant on Economic, Social and Cultural Rights and South Africa’s Bill of Rights.⁶⁹⁴ First, the present article provided a general overview of economic, social and cultural (“ESC”) rights in the context of South African political economy, as well as the country’s 1993⁶⁹⁵ and 1996⁶⁹⁶ constitutions. Second, the article distinguished between ESC rights that are not subject to internal constitutional qualifications, or *priority*

⁶⁹¹ Adjami, *supra* note 28, at 112–113.

⁶⁹² Adjami, *supra* note 28, at 112.

⁶⁹³ Quoted in Christian N. Okeke, *The Use of International Law in the Domestic Courts of Ghana and Nigeria*, 32 ARIZ. J. INT’L & COMP. L. 371, 411–412 (2015).

⁶⁹⁴ South Africa’s Bill of Rights are found in Chapter 2 of the country’s post-apartheid Constitution.

⁶⁹⁵ The 1993 Constitution is generally referred to as the Interim Constitution or the Constitution of the Republic of South Africa Act 2000 of 1993.

⁶⁹⁶ The 1996 Constitution is South Africa’s permanent post-apartheid Constitution or Constitution of the Republic of South Africa No. 108 of 1996.

rights, and those that are subject to internal qualifications, which are referred to as *internally qualified rights*. In doing so, this article identified those constitutional provisions that contain priority rights and those that contain internally qualified rights. Third, this article examined various South African cases to see how the courts interpret various provisions of the Bill of Rights dealing with ESC rights. For example, *Van Biljon and Others v. Minister of Correctional Services and Others*⁶⁹⁷ provided an interpretation for § 35(2)(e) of the Constitution as it relates to the expression “adequate medical treatment.”⁶⁹⁸

Fourth, after examining the various constitutional provisions that guarantee *priority rights*, the article then moved on to examine those constitutional provisions that guarantee *internally qualified rights*. Specific attention was paid to §§ 26, 27 and 29. Again, reference was made to several cases in which South African courts have interpreted these provisions. Finally, the article looked at other ESC rights in South Africa’s Constitution, which do not fit easily into the classifications “priority rights” and “internally qualified rights.”⁶⁹⁹

The final part of the article was devoted to an in depth examination of two important South African cases, which were decided by the country’s Constitutional Court (“CC”) to show the extent to which international law is serving as an interpretive aid or tool in the CC’s evolving jurisprudence, especially as it concerns ESC rights. The cases examined were the *Government of the Republic of South Africa and Others v. Grootboom and Others*,⁷⁰⁰ and the *Minister of Health and Others v. Treatment Action Campaign and Others*.⁷⁰¹ In *Grootboom and Others*, the appellants—the Government of the Republic of South Africa, the Premier of the Province of the Western Cape, the Cape Metropolitan Council, and Oostenberg Municipality—had been ordered by the High Court to provide the respondents (Irene Grootboom and others and their children) with adequate temporary shelter while they waited to

⁶⁹⁷ Van Biljon and Others, *supra* note 366.

⁶⁹⁸ CONST. REP. S. AFRICA, § 35(2)(e).

⁶⁹⁹ For example, rights related to labor relations. *See* CONST. REP. S. AFRICA, § 23.

⁷⁰⁰ Grootboom and Others, *supra* note 444.

⁷⁰¹ Treatment Action Campaign and Others, *supra* note 581.

acquire permanent housing. The appellants had subsequently appealed the High Court's order to the Constitutional Court.

In adjudicating the appeal, Yacoob J, writing for the Court, noted that extensive use was made of international law, noting that “[d]uring argument, considerable weight was attached to the value of international law” as an interpretive tool or aid in the interpretation of the Bill of Rights.⁷⁰² The learned justice also noted that “where the relevant principle of international law binds South Africa, it may be directly applicable.”⁷⁰³ Yacoob J also held that “[t]he differences between the relevant provisions of the [International Covenant on Economic, Social and Cultural Rights (“ICESCR”)] and [the Constitution of the Republic of South Africa] are significant in determining the extent to which the provisions of the [ICESCR] may be a guide to an interpretation of section 26.”⁷⁰⁴

The *Grootboom* Court also considered the views of the UN Committee on Economic, Social and Cultural Rights (“CESCR”). Referring specifically to the CESCR’s General Comment No. 3, Yacoob J noted that it is clear from examining paragraph 10 of General Comment No. 3 that the CESCR “considers that every state party is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum essential level of the socio-economic rights, including the right to adequate housing.”⁷⁰⁵ The learned justice noted, however, that determining the “minimum threshold for the progressive realization of the *right of access to adequate housing*”⁷⁰⁶ must be undertaken through a process that takes “context” into consideration.⁷⁰⁷

A similar approach was adopted in the second case that was examined in the present article, *Minister of Health and Others v. Treatment Action Campaign and Others*.⁷⁰⁸ This, too, was an appeal in which the

⁷⁰² Grootboom and Others, *supra* note 444, at para. 26.

⁷⁰³ Grootboom and Others, *supra* note 444, at para. 26.

⁷⁰⁴ Grootboom and Others, *supra* note 444, at para. 27.

⁷⁰⁵ Grootboom and Others, *supra* note 444, at para. 30.

⁷⁰⁶ Grootboom and Others, *supra* note 444, at para. 32.

⁷⁰⁷ That context includes specifically such factors as “income, unemployment, availability of land and poverty.” Grootboom and Others, *supra* note 444, at para. 32.

⁷⁰⁸ Treatment Action Campaign and Others, *supra* note 581.

appellants prayed for the reversal or dismissal of “orders made in a high court against government because of perceived shortcomings in its response to an aspect of the HIV/AIDS challenge.”⁷⁰⁹ The Court noted that in *Grootboom*, Yacoob J had made use of the ICESCR and had held that in terms of South Africa’s Bill of Rights, the issue that needed to be addressed was “whether the measures taken by the State to realize the right” in question “are reasonable.”⁷¹⁰ The CC in *Treatment Action Campaign and Others*, noted Magaisa, “placed the issues within the international context by referring the country’s obligations in terms of the International Covenant on Economic[,] Social and Cultural Rights.”⁷¹¹ Magaisa also noted that “[i]n two previous cases the CC had tackled the same issue, so this case extends the positive and active stance that the court seems to have taken in relation to matters affecting socio-economic rights” and that “[i]n light of [the CC’s] previous decisions, the justiciability of socio-economic rights is already a settled point and this case only served to cement that position.”⁷¹² In its decisions in both cases, the CC also noted support from jurisprudence from the courts of other jurisdictions, including, for example, Canada,⁷¹³ Germany,⁷¹⁴ India,⁷¹⁵ the UK,⁷¹⁶ and the United States.⁷¹⁷

Scholars who support the use of international law as an interpretive tool argue that “imposing a general obligation on all judges to consider international law will increase the frequency with which international law will influence judicial reasoning since lawyers will increasingly treat international law as a legitimate and reliable resource which operates independently of the judicial personality.”⁷¹⁸ South

⁷⁰⁹ *Treatment Action Campaign and Others*, *supra* note 581, para. 2.

⁷¹⁰ *Grootboom and Others*, *supra* note 444, at para. 33.

⁷¹¹ Alex Tawanda Magaisa, *Minister of Health and Others v. Treatment Action Campaign and Others* (2002), 47 J. AFR. L. 117, 119 (2003).

⁷¹² Magaisa, *supra* note 711, at 120.

⁷¹³ *Treatment Action Campaign and Others*, *supra* note 581, at para. 110.

⁷¹⁴ *Treatment Action Campaign and Others*, *supra* note 581, at para. 109.

⁷¹⁵ *Treatment Action Campaign and Others*, *supra* note 581, at para. 108.

⁷¹⁶ *Treatment Action Campaign and Others*, *supra* note 581, at para. 111.

⁷¹⁷ *Treatment Action Campaign and Others*, *supra* note 581, at para. 107.

⁷¹⁸ Graham Hudson, *Neither Here nor There: The (Non-) Impact of International Law on Judicial Reasoning in Canada and South Africa*, 21 CANADIAN J. L. & JURISPRUDENCE 321, 347 (2008).

Africa's post-apartheid constitution—the Constitution of the Republic of South Africa, 1996—imposes an obligation on courts to consider international law when they interpret the Bill of Rights. According to § 39, “[w]hen interpreting the Bill of Rights, a court, tribunal or forum—(b) *must* consider international law; and (c) *may* consider foreign law.”⁷¹⁹ In addition, the Constitution states that “[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”⁷²⁰ Finally, the Constitution provides that “[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”⁷²¹

South Africa's post-apartheid legal order is governed by “clear and robust rules which [have] replaced [the country's] common law system.”⁷²² Within this new post-apartheid legal system, the applicability of international law is governed by constitutional provisions. Nevertheless, it is noted that South African judges do not always make use of international law in their decisions and that “ideology and judicial personality obstruct the full realization of international law in South African constitutional adjudication.”⁷²³ These criticisms aside, it is important to recognize the fact that South Africa's post-apartheid legal system is young and still in its embryonic stages. As argued by Hudson, “[i]t may be that time is one of the most significant alternate variables; maybe it simply takes more time than has passed in South Africa for lawyers and judges to become fully immersed in international legal culture.”⁷²⁴ Hudson argues further that “[r]espect for authority is cultivated through repeated engagement with institutional rules and roles; actors come to identify themselves as

⁷¹⁹ CONST. REP. S. AFRICA, 1996, art. 39(1)(b–c). Emphasis on (b) and (c) in original. Emphasis on “must” and “may” added.

⁷²⁰ CONST. REP. S. AFRICA, 1996, art. 232.

⁷²¹ CONST. REP. S. AFRICA, 1996, art. 233.

⁷²² Hudson, *supra* note 718, at 352.

⁷²³ Hudson, *supra* note 718, at 352–53.

⁷²⁴ Hudson, *supra* note 718, at 353.

members of a social institution and feel obligated to discharge their obligations as members.”⁷²⁵

With respect to the recognition, respect and protection of human rights, the ideal situation is for each African country to incorporate the provisions of international human rights instruments into their national constitutions and thus, create rights that are justiciable in domestic courts. This process, of course, will take some time. In the meantime, as noted by the International Commission of Jurists, in countries where “international treaties do not apply until domestic legislation reproduces or refers to the content of a treaty,” judges in such countries “have developed more creative ways of making use of international standards.”⁷²⁶ The International Commission of Jurists then went on to mention that South Africa, which at the time had not yet ratified the International Covenant on Economic, Social and Cultural Rights and hence, was not a State Party to the Covenant, actually “used CESCR’s General Comments to interpret the ESC rights enshrined in the South African Constitution.”⁷²⁷

The policy imperative in African countries that have not done so is for each of them to engage in robust constitutional reforms to provide themselves with national constitutions undergirded by the separation of powers with checks and balances. Among the checks and balances must be a truly and fully independent judiciary, armed with the necessary capacity to function effectively as a check on the exercise of government power. The functions of such an independent judiciary must include the interpretation of the national constitution. In addition, each country should domesticate international human rights instruments and create rights that are justiciable in domestic courts. Where the incorporation of international law into the national constitution has not yet taken place, judges can use their powers to interpret the constitution to bring local laws, including customs and traditions, into compliance or conformity with the provisions of international human rights instruments. Thus, in the absence of the

⁷²⁵ Hudson, *supra* note 718, at 353.

⁷²⁶ International Commission of Jurists, *supra* note 235, at 19.

⁷²⁷ International Commission of Jurists, *supra* note 235, at 19. *See also* Grootboom and Others, *supra* note 444, at paras. 29, 30, 31, and 45.

domestication of international human rights law through positive legislative acts, courts can minimize the abuse of human rights by using international law as an interpretive tool in their legal adjudications. The ultimate goal, however, remains the domestication of international human rights instruments to create rights that are justiciable in domestic courts.